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PRACTICAL GUIDE

TO THE

Duties of Churchwardens,

IN THE EXECUTION OF THEIR OFFICE;

WITH LISTS OF CASES, STATUTES, CANONS, ETC., AN APPENDIX AND INDEX.

Thirteenth Edition.

BY

CHARLES GREVILE PRIDEAUX,

Of Baliol College, Oxford, M.A., and of Lincoln's Inn, Esquire, one of Her Majesty's Counsel.

Dclicta majorum immeritus lues,
Romane, donec templa refeceris,
Ædesque labentes.—
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DEDICATION.

To all who may enter upon the office of Churchwarden with an earnest desire conscientiously to discharge their important functions, and by upholding the fabrics of the Church, by preserving due reverence within the Consecrated Precincts, and by checking to the utmost all gross impiety and immorality in their parishes, to promote the glory of GOD and the well-being of their fellow parishioners, this book is respectfully dedicated by

THE AUTHOR.

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PREFACE

TO THE THIRTEENTH EDITION.

THE Author has had the pleasing duty of preparing yet another edition of this little work for the press.

As on former occasions, he has endeavoured to carry down the law and the authorities to the time of publication, and to render the book in all respects as useful and complete as its limited size would permit.

He has, as in the last edition, endeavoured to adapt it practically as well to the present state of the law as to the present state of circumstances—a task of no little difficulty as regards church rates and the repair of churches, owing to the provisions of "The Compulsory Church Rate Abolition Act, 1868," which (except in certain cases where the payment may still lawfully be enforced) abolishes the power to compel payment of church rates by legal process, without abolishing church rates, or otherwise materially altering the law of church rates, save as to the *status* of certain ecclesiastical districts, and without exonerating the parishioners from the duty of repairing their parish church.

Several Acts of Parliament bearing upon matters dealt with in this book, among them "The Prayer Book (Tables of Lessons) Act, 1871," "The Act of

Uniformity Amendment Act, 1872," and "The Religious Worship Regulation Act, 1874," have been passed since the publication of the last edition. The "directions" and "tables of lessons" under the first-named Act will be found in all Prayer Books printed and published since the first day of October, 1871. The other two statutes have been deemed of sufficient interest and importance to warrant their being set out in the Appendix.

The rules and orders (but not the forms) made under the last-named Act will also be found in the Appendix.

4, Brick Court, Temple,
August, 1875.

N.B.—The excellent Ecclesiastical Reports known by the unassuming title of "Notes of Cases in the Ecclesiastical Courts," are thus cited: N.E.C., *Notes of Ecclesiastical Cases.*

The numerous references to Dr. *Prideaux's* "Directions to Churchwardens" are made to the 10th, Mr. Tyrwhitt's edition.

And by the reference "Ecc. Law Rep.," which occurs several times in the course of this work, is meant the "General Report of the Second Ecclesiastical Commission," made February, 1832.

Note.—The *Dean* of *Arches* has just (31st July, 1875), refused the faculty in Mr. Keet's case: see p. 366. He did not pronounce an opinion that prefixing the title "Revd." to the description "Wesleyan Minister" was clearly illegal. The incumbent was, subject to the control of the Ordinary, the judge of the expediency and propriety of allowing it to be used; and it would not be proper, or consonant to practice, that that Court should overrule not only the direct dissent of the incumbent, but also the deliberate judgment and authority of the Bishop in the matter.

ERRATA.

Page 43, line 14, for "possible" read "probable."

Appendix.

Page xlviii, line 11, for "years" read "days."

PREFACE

TO THE FIRST EDITION.

It is felt that the object of the following treatise, —namely, to furnish the Churchwarden with a guide to the performance of his official duties,— might, in great measure, have been effected by giving a new edition of Dr. *Prideaux's* "Directions to Churchwardens;" but in consequence of the altered state of the law—the increased importance of the question of church rates—and with a view to a more practical arrangement of the subject—it has been thought preferable to prepare an original treatise.

The Author has, however, to a considerable extent, made the above celebrated work the basis of the present publication, and has incorporated in the following pages such portions of it as appeared applicable to existing circumstances.

2, Elm Court, Temple,
15*th May*, 1841.

CONTENTS.

CHAPTER I.

On the Offices of Churchwarden and Sidesman, the Liabilities of Parties to be chosen, their Appointment and Admission.

PAGE

SECT. 1. On the offices of churchwarden and sidesman - 1

SECT. 2. As to the persons liable to be chosen to the office of churchwarden, and the persons disqualified and exempt from serving that office - - - 5

SECT. 3. On the appointment and admission of churchwardens - - - - - - - - 18

HAPTER II.

On the Duties of Churchwardens with reference to the Utensils, &c., of the Church, and the Repairs of the Church and Churchyard.

SECT. 1. Of the goods and utensils of the church which the churchwardens ought to supply, and of the repairs of the church and churchyard which it is their duty to superintend - - - - 48

SECT. 2. On the Compulsory Church Rate Abolition Act, 1868 - - - - - - - - 87

SECT. 3. Of the first steps to be taken by the churchwardens for the purpose of effecting the necessary repairs; of calling a vestry; with some observations on vestries generally - - - - - - 96

SECT. 4. Of granting the rate, making the assessment, and of getting the rate confirmed by the ordinary - 166

SECT. 5. On the additional steps to be taken when anything new is to be added to the church - 196

SECT. 6. Of rates for the repayment of money borrowed on the security of church rates - - - - 204

CHAPTER III.

On collecting the Rate, and herein on the methods of enforcing the payment of Church rates in those cases in which they can still be enforced; on the various grounds of resisting payment; and on the liability of the Parishioners in respect of necessary Repairs.

PAGE

SECT. 1. On collecting the rate, with some observations on the compulsory recovery of rates made under private and local Acts of parliament within the meaning of the fifth section of the Compulsory Church Rate Abolition Act, 1868 - - - 211

SECT. 2. On the summary proceedings before justices of the peace for enforcing payment of church rates - 214

SECT. 3. On suits in ecclesiastical courts for the subtraction of church rates, and the ordinary grounds of resisting payment - - - - - - 242

SECT. 4. On the extent of the liability of the parishioners with respect to the repairs of churches; and on the methods of enforcing such repairs - - 298

CHAPTER IV.

On the further Duties of Churchwardens with respect to the Church, Churchyard, Church Goods, &c.

SECT. 1. On the duties of the churchwardens with respect to the seats of the church - - - - 323

SECT. 2. On the duties of the churchwardens with regard to the performance of divine service, and to the preservation of due order and decorum in the church and churchyard - - - - - 344

SECT. 3. On the repairs of the chancel, &c. - - - 358

SECT. 4. On the right of the churchwardens to access to the church, and their power and duty with reference to the disposal of the goods and utensils of the church, and as to the setting up and removing of fixtures, monuments, tombs, &c. On the ringing of the church bells - - - - - - 361

CHAPTER V.

On Visitations and Presentments, &c.,—On Sequestrations—on the going out of office and the passing of the Churchwardens' Accounts.

PAGE

SECT. 1. On visitations and presentments, and the general duties of the churchwardens as the guardians of the moral character and public decency of the parish; and on "The Public Worship Regulation Act, 1875" - - - - - - - - 370

SECT. 2. On sequestrations - - - - - - - 434

SECT. 3. On the annual return to be made by the churchwardens to one of Her Majesty's principal Secretaries of State of the amount of church rates levied in their parish, on passing the accounts of the old churchwardens, and on delivering over the goods of the church to their successors in office - - - - - - - - - - 438

APPENDIX.

Statute 58 Geo. 3, c. 69—An Act for the regulation of parish vestries - - - - - - - - - - - i

Statute 59 Geo. 3, c. 85—An Act to amend and correct an Act of the last session of parliament for the regulation of parish vestries in England - - - - - - iv

Statute 1 & 2 Will. 4, c. 60—An Act for the better regulation of vestries and for the appointment of auditors of accounts in certain parishes of England and Wales - vi

Statute 13 & 14 Vict. c. 57—An Act to prevent the holding of vestry or other meetings in churches, and for regulating the appointment of vestry clerks - - - xviii

Statute 23 & 24 Vict. c. 32—An Act to abolish the jurisdiction of the Ecclesiastical Courts in Ireland in cases of defamation, and in England and Ireland in certain cases of brawling - - - - - - - xxiv

PAGE.

The material provisions of statute 23 & 24 Vict. c. 51—An Act to provide for an annual return of rates, taxes, tolls and dues levied for local purposes in England - - - - - - - - - xxvi

Statute 32 & 33 Vict. c. 41—An Act for amending the law with respect to the rating of occupiers for short terms, and the making and collecting the poor's rate - xxvii

Statute 35 & 36 Vict. c. 35—An Act for the amendment of the Act of Uniformity - - - - - xxxii

Statute 37 & 38 Vict. c. 85—An Act for the better Administration of the Laws respecting the Regulation of Public Worship - - - - - - xl

The judgment of the Judicial Committee of the Privy Council in the cases of *Liddell* (clerk) and *Horne and others* against *Westerton*, *Liddell* (clerk) and *Parke and Evans* against *Beale*, so far as the same relates to the construction of the introductory rubric of the Book of Common Prayer - - - - - - xlix

Report of the case of *Fuller* v. *Lane* - - - - - liii

The 30th Canon of 1604, intituled "The lawful use of the Cross in Baptism explained" - - - - - lxv

Extract from first part of the Homily "Of the Salvation of Mankind by only Christ our Saviour from sin and death everlasting," being the third Homily of the First Book of Homilies - - - - - - lxvii

Extract from the second part of the said Homily - - lxviii

Articles of inquiry - - - - - - - - lxviii

The Table of Ecclesiastical Fees and Payments (so far as the same relates to the consecration of churches, chapels, and burial grounds, visitations, and the grant of faculties), made and settled under the authority of the statute 30 & 31 Vict. c. 135, intituled "An Act for the Establishment of a table of fees to be taken on the consecration of churches, chapels, and burial grounds, on the ordinations of deacons and priests, and on visitations" - - - - - - lxxii

The rules and orders of Court under "The Public Worship Regulation Act, 1874" - - - - - lxxiv

LIST OF CASES.

Abdy's case, 11.
Adams *v.* Rush, 442.
Adey *v.* Hill, 101.
Adey *v.* Theobald, 10, 14, 34, 36, 40.
Adlam *v.* Colthurst, 198, 356.
Alderman *v.* Neat, 71.
Allan *v.* Liverpool, 185.
Allason *v.* Hook, 71.
Amherst, Lord, *v.* Lord Summers, 180.
Andrews *v.* Cawthorne, 382.
Andrews *v.* Hutton, 173.
Annesley, *Ex parte*, 71.
Anon. (Bernard.), 22.
Anon. (Bulst.), 169,
Anon. (2 Chitt.), 42.
Anon. (Freem.), 242.
Anon. (Goodb.), 381.
Anon. (Lofft.), 146, 147.
Anon. (Noy, and Lord Raym.), 23.
Anthony *v.* Seger, 9, 37, 41, 43, 46, 117, 438.
Ashby *v.* Harris, 386.
Ashby *v.* White, 115.
Asterley and others *v.* Adams, 243, 287, 290.
Astle *v.* Thomas, 3, 246, 445.
Atkinson, *Ex parte*, 13.
Attenborough *v.* Kemp, 295.
Attorney-General *v.* Draper's Company, 159.
Attorney-General *v.* Foster, 6.
Attorney-General *v.* Lewin, 71.
Attorney-General *v.* Lichfield, Corporation of, 275.
Attorney-General *v.* Magdalan College, Oxford, 71.
Attorney-General *v.* Merchant Taylors Company, 356.
Attorney-General *v.* Roper, 439.
Attorney-General *v.* St. Cross, The Master and Brethren of the Hospital of, 22, 37, 435.
Attorney-General *v.* Salkeld, 71.
Aulton *v.* Roberts, 149.
Austen *v.* Dagger, 358.

B.

Backhouse *v.* The Churchwardens of Bishopswearmouth, 233, 238.
Baker and Downing *v.* Wood, 98, 127, 129, 130, 131, 244.
Baker and others *v.* Thorogood, 296.
Barber's case, 39.
Barlow, *In re*, 25, 34, 44.
Barnes *v.* Grant, 191, 289, 294.
Barnes *v.* Shore, 426.
Bartlett, *Re*, 427.
Bateman, *In re*, 326.
Batkin, *In re*, and the Justices of Staffordshire, 240.
Batt *v.* Watkinson, 135, 440.
Battiscombe *v.* Eve, 202.
Bavin *v.* Hutchinson and another, 112.
Beale *v.* Liddell, 20, 50.
Beall, *Ex parte*, 172, 263, 270.
Beckwith *v.* Harding, 365.

Bell *v.* Crane, 189.
Bender *v.* Peacock, 384.
Bennett *v.* Bonaker, 354, 374, 395.
Berry *v.* Banner, 137, 138.
Bettison, *In re*, 355.
Bird *v.* Smith, 20.
Birmingham, Churchwardens of, *v.* Shaw, 188.
Birnie *v.* Weller, 34, 35.
Bishop *v.* Stone, 411.
Bishop *v.* Turner, 364.
Blackett *v.* Blizard and another, 138, 142, 250.
Blackmore, *Ex parte*, 384, 387.
Blount *v.* Fife, 244, 245.
Bluck *v.* Rackham, 426.
Blunt and Fuller *v.* Harwood, 103, 104, 107, 204, 208, 210, 250.
Bond *v.* Douglas, 322.
Bonwell *v.* The Bishop of London, 427.
Bordeaux *v.* Lancaster, 383.
Brabin *v.* Tredeman, 335.
Bradford Library Soc. *v.* Churchwardens of Bradford, 188.
Bray, app., Somer, resp., 36, 38.
Breeks *v.* Woolfrey, 366, 406.
Bremner and others *v.* Hall, 23, 24, 39, 246.
Brettell *v.* Wilmot and King, 277, 280.
Briggs, *Ex parte*, 166.
Bryan *v.* Whistler, 385, 386.
Brook *v.* Owen, 7.
Brooks *v.* Cresswell, 427.
Bull *v.* Jones, 324.
Bumfit *v.* Roberts, 337.
Burder *v.* ———, 427.
Burder *v.* Cresswell, 427.
Burder *v.* Hale, 358, 415, 417, 427.
Burder *v.* Hodgson, 427.
Burder *v.* Langley, 417.
Burder *v.* Mavor, 427.
Burder *v.* Selmes, 348, 357, 358.
Burder *v.* Speer, 427.
Burder *v.* Veley, 75, 97, 168, 214, 244, 249, 306, 310.
Burgoyne *v.* Free, D.D., 354, 374, 427.
Burnell *v.* Jenkins, 295.
Burnelley *v.* the Overseers of Methley, 102.
Burton *v.* Henson, 323, 326, 347.
Burton *v.* Wileday, 175.
Bute, Earl of, *v.* Grindall, 180.
Bute, Lord, *v.* Grindall, 180.
Butt's case, 23, 25.
Butt *v.* Fellows, 19, 21, 38, 46, 101, 105, 108, 109, 133, 217, 272, 279, 280.
Butterworth and Barker *v.* Walker and Waterhouse, 305.
Buxton *v.* Bateman, 324.
Byerley *v.* Windus, 325, 334, 336.

C.

Campbell *v.* Liverpool, The Corporation of, 73.
Campbell *v.* Maund, 117, 118, 125.
Campbell and another *v.* The Parishioners of Paddington, 354, 355.
Cansfield *v.* Blenkinsop, 153, 154, 155.
Carr *v.* Marsh, 426.
Carr *v.* Mostyn, 3, 383.
Carter *v.* Cropley (*V. C. Kindersley*), 159.
Carter *v.* Cropley (*Lords Justices*), 159.
Castle *v.* Richardson, 45.
Catten *v.* Barwick, 24, 25.
Chambers *v.* Jones and another, 86.
Champneys *v.* Arrowsmith, 72, 73.
Chapman *v.* Jones, 72, 324.
Chester's case, 169.
Chesterton and Hutchins *v.* Farlar, 170, 174, 191, 267, 268, 271, 274, 275, 284, 285, 441.
Churton *v.* Frewen, 324.
Clarendon, Earl of, *v.* St. James's, Westminster, 188.
Clarke *v.* Grant, 4.
Clarke *v.* Heathcote, 427.
Clarke *v.* King, 137.

Clayston, Churchwardens of, and Duncombe, 78.
Clergyman, *Ex parte*, 426.
Clifford *v.* Wicks, 330, 331.
Clovell *v.* Cardinall, 374.
Clutton *v.* Cherry, 115, 295.
Cobb *v.* Peacock, 384.
Cockburn *v.* Harvey, 136, 248, 249.
Collins *v.* Rose, 240.
Cooper *v.* Allnutt, 15, 38.
Cooper *v.* Dodd, 20, 388.
Cooper *v.* Law, 364.
Cooper *v.* Wickham, 316, 317.
Cope, *clerk*, app., Barber and others, resps., 352.
Cornwall and Pain *v.* Woods, 109, 118, 119, 120.
Corven *v.* Pym, 324.
Cory and others *v.* Byron, 346, 357.
Cory and others *v.* The Churchwardens of Greenwich, 185.
Cowen's case, 326.
Cox *v.* Goodday, 346, 348, 357.
Cox *v.* Rycraft, 360.
Craig *v.* Watson and another, 335.
Craven *v.* Saunderson, 179.
Cronshaw *v.* The Wigan Burial Board, 30, 384.

D.

Dakins *v.* Seaman, 435.
Dale *v.* Pollard, 225, 241, 313, 315.
Daunt *v.* Crocker, 369.
Davis *v.* Black, 374.
Davis *v.* Witts, 334.
Davys, app., *v.* Douglas, resp., 233.
Davy's (Serjeant) case, 177.
Dawe *v.* Williams, 108.
Dawney *v.* Dee, 324.
Dawson *v.* Fowler, 24.
Day *v.* Beddingfield and another, 385.
Day *v.* Peacock, 384.
Denison *v.* Ditcher, 374, 415.
Denison, *Ex parte*, 374.
Dent *v.* Prudence and Bond, 439.
Dewdney *v.* Good and Ford, 198, 355, 361.
Ditcher *v.* Denison, 374, 414, 415.
Dobison *v.* Fussey, 142, 250.
Doe dem. Edmunds *v.* Llewellin, 117.
Doe dem. Edney *v.* Billett, 71.
Doe dem. Higgs *v.* Terry, 70.
Doe dem. Hobbs. *v.* Cockell, 70.
Doe dem. Jackson *v.* Hilly, 73.
Doe dem. Townsend *v.* Mace, 37.
Dowdall *v.* Hewett, 348.
Duffield, *Ex parte*, 42.

E.

Eastern Counties Railway Company and Overseers of Moulton, *Re*, 193.
Ecclesiastical Commissioners *v.* The Vestry of Clerkenwell, 159.
Edney and Lunn, *v.* Smallbones, 39, 176, 287.
Edwards, *Ex parte*, 374.
Edwards and Mann *v.* Hutton, 191, 288, 289.
Eld *v.* Perry and Ward, 332.
Ellis and Gough *v.* Griffin, 25, 244.
Elphinstone *v.* Purchas, 52, 58, 63, 64, 400, 401, 402, 405, 407, 409.
Elt *v.* The Burial Board of St. Mary's, Islington, 120, 125.
Ely, Bishop of, *v.* Gibbons and Goody, 74, 176.
Escott *v.* Mastin, 390.
Evelin's case, 21, 23.
Ewens and Spear *v.* Latimer, 246.
Exeter, Bishop's case, 387.
Exeter, Bishop of, *v.* Marshall, 20.
Exeter, Dean and Chapter's case, 21, 385.

F.

Fane, Sir Walter's case, 39.
Farlar *v.* Chesterton and Hutchins, 174, 268, 271, 272, 277, 280, 285.

Farnell *v.* Craig, 427.
Farrell and another *v.* Smith, 254.
Faulkner v. Elger, 116, 122.
Faulkner *v.* Lichfield and Stearn, 50, 55.
Fielden *v.* Standen and Cook, 313, 315.
Fitzgerald *v.* Champneys, 30, 395.
Flamank *v.* Simpson, 374.
Fleming's case, 381.
Foot *v.* Prowse, 37.
Forbes *v.* The Ecclesiastical Commissioners of England, 254.
Ford *v.* Chauncey, 8.
Foster *v.* Dodd and another, 79.
Francis *v.* Ley, 324, 385.
Francis *v.* Steward, 316.
Freeland *v.* Neale, 426.
Fruen *v.* Dean of York, 21.
Fry and Greata *v.* Treasure, 46, 246.
Fryer *v.* Johnson, 385.
Fuller *v.* Lane, 324, 326, 336, Appendix, liii.
Furnival *v.* Coombes, 86.

G.

Gardner and another, apps., Ellis, resp., 202.
Gathercole *v.* Wade, 259.
Gaudern *v.* Silby, 21, 307.
Gavill *v.* Utter, 46, 71.
Gell *v.* Mayor, &c., of Birmingham, 155.
Gibbs and another *v.* Flight and another (C.P.), 24, 25, 46, 135, 140.
Gibbs and another *v.* Flight and another (*Scac. Cam.*), 46, 135, 140.
Gibson *v.* Wright, 328.
Gilbert v. Buzzard, 382, 384.
Gilchrist *v.* Bracebridge, 13.
Glover *v.* Hind, 347, 352.
Golding *v.* Fenn, 24, 137, 138.
Goldsworth *v.* Knights, 71.
Goodall and Gray *v.* Whitmore and Fenn, 137, 295.
Goodday *v.* Mitchell, 292.
Gorham *v.* The Bishop of Exeter, 418.
Gorham *v.* The Bishop of Exeter (*Arches*), 415, 418, 422.
Gorham *v.* The Bishop of Exeter (P.C.), 418, 422, 423.
Goslin *v.* Ellison, 45, 428.
Gosling *v.* Veley (Q.B.), 168, 308, 320.
Gosling *v.* Veley (*Scac. Cam.*), 75, 168, 275, 278, 300, 308.
Gosling *v.* Veley (*Dom. Proc.*), 75, 97, 160, 168, 249, 285, 308, 310.
Gough and Cartwright *v.* Jones, 30, 81, 84, 107, 281, 294, 295.
Graves, *Ex parte*, *Re* The Mayor of Peterborough, 125, 166.
Greenslade *v.* Darby, 72, 359.
Greenway *v.* Hockin, 337.
Greenwood and Spedding *v.* Greaves and others, 167, 298, 317, 321.
Greig *v.* The University of Edinburgh, 181.
Griffin *v.* Deighton, 71, 149, 353, 359.
Griffiths *v.* Read, 1, 427.
Grove and Elliott's case, 19, 20.
Grove and Wright *v.* The Rector, &c., of Hornsey, 200.

H.

Hadman and Green *v.* Ringwood, 245, 439.
Halford *v.* Copeland, 182.
Hall *v.* Ellis, 330.
Hall *v.* Maule, 27, 136.
Hallack *v.* The University of Cambridge, 334.
Harding *v.* Hall, 437.
Harpur *v.* Forbes and Sisson, 354, 355.
Harrington and Stone *v.* Franklin, 314.

Harris *v.* Drew, 327.
Harrison *v.* Forbes and Sisson, 369.
Harrison *v.* Stickney, 274, 285.
Hawe *v.* Planner, 347.
Hawes and Vicatt *v.* Pellatt, 191, 243, 290, 294, 295.
Hawkins's case, 74.
Hawkins *v.* Compeigne, 183.
Hawkins *v.* Rouse, 248.
Head *v.* Saunders, 374, 411.
Heath *v.* Burder, 410.
Hebbert *v.* Purchas, 66, 400, 401, 402, 403, 405, 409, 410.
Helston case, 65, 381, 391, 401.
Henley *v.* Barstowe, 374.
Heudebourk *v.* Langton, 134.
Hill and Bailey *v.* Haskew, 177, 191, 265, 289, 290.
Hilton *v.* Pawle, 3.
Hilton and Walkerfield, Overseers of, apps., Overseers of Bowes, resps., 184.
Hinde, app., Charlton, resp., 336.
Hodgson *v.* Carlisle, the Local Board of Health of, 180.
Hodgson *v.* Oakley, 413.
Hollyness *v.* The Churchwardens of Kettering in Northamptonshire, 183.
Hooper *v.* Stevens, 273.
Hopkinson *v.* Puncher, 87, 322.
Hopton and Quarrell *v.* Minister, &c., of Kemerton, 196, 204, 276.
Horsfall *v.* Holland and Woolley, 335.
Hubbard *v.* Beckford, 436.
Hubbard *v.* Penrice, 19, 20.
Hughes *v.* Denton, 30.
Hunt *v.* Nash, 273.
Hurrell *v.* Wick, 218.
Hutchins *v.* Denziloe and Loveland, 346, 348, 349, 357, 358.

I.

Ile's case, 154.
Inman *v.* Kirkdale, 185.
Irvine, *Re* The Rev. G. M. D'Arcey, 395.

J.

Jackson *v.* Adams, 49, 361.
Jackson *v.* Courtenay, 148, 149.
Jackson *v.* Singer and Carson, 201, 202.
Jacquet *v.* Lewis, 86.
Jarman *v.* Bagster, 358.
Jarratt *v.* Steele, 353.
Jay *v.* Webb, 304.
Jeffries' case, 214.
Jeffries, *Ex parte*, 11.
Jenkins *v.* Cook, 412.
Jermyn's case, 145.
Johnson, *Ex parte*, 147, 154.
Johnson *v.* Friend and Ballard, 389.
Jolly *v.* Baines, 243.
Jones *v.* Ashburnham, 382.
Jones *v.* Ellis, 71, 335.
Jones *v.* Evans, 87.
Jones, app., Gough and others, resps., 30, 84.
Jones *v.* Johnson and Morgan, 275.
Jones and others *v.* The Mersey Docks and Harbour Board, 181, 184.
Joyce and others, *Ex parte*, 34, 132.

K.

Keet, Mr.'s (The *Owston Ferry* Tombstone) case, 366. Prefatory introductions, vi.
Kemp *v.* Wickes, 387, 390.
Kemp and Page *v.* Attenborough, 148, 156, 260, 266, 278.
King *v.* Alston, 383.
Kington *v.* Hack, 296.
Kitson *v.* Drury, 426.
Kitson *v.* Loftus, 427.
Kitto *v.* The Guardians of the Liskeard Union, 185.
Knapp *v.* The Parishioners of St. Mary, Willesden, 326.
Knight *v.* Moseley, 360.
Knight and Littlejohns *v.* Gloyne, 195.

L.

Lambe and Clarke *v.* Grieves, 114.
Lambert and Simpson *v.* Weall, 190, 192, 288, 289.
Lancashire, Justices of, *v.* Shelford, 180.
Lanchester *v.* Frewer, 134, 441.
Lanchester *v.* Thompson, 268.
Lanchester *v.* Tricker, 86, 134, 268.
Le Crew, *Ex parte*, 305.
Lee *v.* Matthews, 361, 369.
Lee and Parker *v.* Calcraft, 168, 195, 282, 198, 285.
Leman *v.* Goulty and another, 443.
Liddell *v.* Beale, 51, Appendix, xlix.
Liddell *v.* Beale (14 Moore, P.C.), 49, 51, 59, 68.
Liddell *v.* Westerton, (*Arches*), 50, 51, 53, 55, 59, 62, 67.
Liddell *v.* Westerton, (P.C.) 50, 51, 54, 56, 58, 60, 63, 65, 402, 405, Appendix, xlix.
Liddell and others *v.* Rainsford, 348.
Lilly *v.* Hardy, 289.
Lincoln, Bishop of, *v.* Day, 427.
Lincoln, Mayor of, app., Overseers of Holmes Common, resps., 184.
Linnæan Society of London *v.* St. Anne's, Westminster, 188.
Linnell and Walker *v.* Gunn, 227.
Littlewood *v.* Williams, 382, 384, 393.
Liverpool Library *v.* Mayor of Liverpool, 188.
Liverpool, Rector of, *Ex parte*, 73.
Liverpool United Gas Company, apps., The Union Assessment Committee of the Union of West Derby, resps., 232.
Lloyd *v.* Burrup and another, 343.
Lloyd *v.* Heathcote, 245.
Lloyd and Owen *v.* Williams, 19.
Lorant and another *v.* Scadding, 38, 108, 217.
Lousley *v.* Hayward 334.
Lowe, *Ex parte*, 42.
Lynch and Shea, *In re*, 388.

M.

Maddox *v.* Carr, 427.
Magee *v.* The Bishop of Cashel, 348.
Maidman *v.* Malpas, 365.
Mannering, *Ex parte*, 227.
Marlborough, Duke of, *v.* St. John, 360.
Marriott *v.* Tarpley, 245, 354, 439.
Marsh *v.* Davies, 86.
Marshall *v.* The Bishop of Exeter, 20.
Martin *v.* Mackonochie (*Arches*), 58, 399, 400, 408.
Martin *v.* Mackonochie (P.C.), 58, 399, 400, 402, 404, 407, 408, 409.
Martin *v.* Mackonochie (second suit), 66, 399, 400, 401, 403, 406, 409, 410.
Martin and Wife *v.* Watkin and others, 363, 445.
Marylebone Vestry *v.* The Zoological Society, 188.
Mastin *v.* Escott, 387, 390, 391.
Mawbey, *Ex parte*, 132, 133.
Mawley *v.* Barbet and Alt., 134, 135.
May, *Ex parte*, 213, 233.
May *v.* Gilbert, 327.
May *v.* Gwynne, 166.
Maynard, Lord, *v.* Brand, 275, 315, 317, 318.
Medland and Brown *v.* Paine, 113, 167, 174, 183, 190, 277, 288.
Mersey Docks and Harbour Board *v.* Cameron and others, 181, 184.
Methold *v.* Winn, 362, 445.
Metropolitan Board of Works *v.* The Overseers of West Ham, 185.
Meyrick (R. pros.) app., *v.* The Guardians of the Battle Union, resps., 184.

Middleton and Wife *v.* Crofts, 19.
Miller *v.* Bloomfield, 174, 190, 192, 287.
Miller and Simes *v.* Palmer and Kilby, 317, 318, 441.
Mills *v.* Rydon, 87.
Moone's case, 349.
Moore *v.* Cooke, 362.
Moore *v.* Moore, 20.
Morgan *v.* Archdeacon of Cardigan, 15.
Morgan *v.* Curtis, 331.
Morris *v.* Ogden, 427.
Morton *v.* Tabiner, 288.
Moss *v.* Edwards, 374.
Moss *v.* Thorniley, 49, 86, 361, 440.
Mounsey *v.* Robinson, 374.
Moysey *v.* Hillcoat, 348.

N.

Neave *v.* Weather, 182.
Nevill *v.* Bridger, 385.
Neville *v.* Baker, 385.
Newberry *v.* Goodwin, 357, 377.
Newton *v.* Town Clerk of Salisbury, 101.
Nichols *v.* Davis, 146.
Nichols *v.* Walker, 3.
Northampton Churchwardens' case, 25.
Northwaite *v.* Bennett, 86, 315, 318, 364, 441.
Norwich, Bishop of, *v.* Berney, 427.
Norwich, Bishop of, *v.* Pearce, 374, 427.
Nott, app., Bond, resp., 229.
Nunn *v.* Varty and Mopsey, 33, 73, 191, 275, 276, 286, 299.
Nurse *v.* Henslowe, 388, 391.

O.

Olive *v.* Ingram, 5, 148, 156.
Omerod *v.* Chadwick, 101, 218.

P.

Paddington Charities, *In re*, 71.
Palmer *v.* Episcopum Exon., 203.
Palmer *v.* Roffey, 352, 357, 358.
Parham *v.* Templar, 333.
Parker *v.* Clerk, 148.
Parker, Clerk, app., Leach, resp., 202, 325.
Partington *v.* The Rector of Barnes, 324.
Patten *v.* Castleman, 383.
Pawson *v.* Scott, 326.
Peake *v.* Bourne, 146.
Pearce and Hughes, Churchwardens of Clapham *v.* The Rector, &c., of the same parish, 69, 304.
Pease and others *v.* Chaytor and another, 222, 238, 240, 241.
Pemberton's case, 39.
Penruddock, *Ex parte*, 40, 43.
Pense *v.* Prowse, 248, 259.
Phillips *v.* Pearse, 71.
Philibrown *v.* Ryland, 115.
Philpots *v.* Boyd and others, 61.
Pierce *v.* Prowse, 248, 259.
Piggott *v.* Bearblock and Newman, 179, 260, 268, 270, 271.
Pigott, Mr. Arthur Gooch's case, 388.
Pimlico Tramway Company *v.* The Overseers of Greenwich, 185.
Pindar *v.* Barr, 145.
Poole *v.* The Bishop of London, 415.
Poole *v.* The Bishop of London (P.C.), 417.
Poordage's, Dr., case, 39.
Presgrave *v.* the Churchwardens of Shrewsbury, 327.
Price *v.* Quarrell, 3.
Priestly *v.* Lamb, 20.
Prowse's case, 11, 39.
Prout *v.* Cresswell, 435.
Pullen *v.* Cleaver, 374.
Purchas *v.* The Churchwardens of the Holy Sepulchre, 188.
Purvis and others *v.* Trail, 188.

Q.

Quilter *v.* Newton, 354.

R.

Ramsbottom *v.* Duckworth, 3, 195, 226, 231.
Rand and another *v.* Green and another, 107, 262.
Ranson *v.* Campkin, 133, 291.
Rawlinson *v.* Medwin and Hurst, 332.
R. *v.* Abney and another, 254.
R. *v.* Abney Park Cemetery Company, 185.
R. *v.* Adlard, 6.
R. *v.* All Saints, Wigan, Churchwardens of, and others, 257, 270.
R. *v.* Allen, 19.
R. *v.* Arkwright, 199.
R. *v.* Ashton, 146, 147.
R. *v.* Baines, 234, 247, 296.
R. *v.* Barker and others, 176.
R. *v.* Barrow and others, 160.
R. *v.* Battle, Sussex, guardians of the union of, and others, 185.
R. *v.* Benson (Clerk), 397, 398.
R. *v.* Berwick, 6.
R. *v.* Best and others, 101.
R. *v.* Bidwell, 217, 240, 439.
R. *v.* Birmingham, Rector of, 33, 98, 120.
R. *v.* Blackburn and another, and James Crofts, 222.
R. *v.* Bluck, 147.
R. *v.* Bobbing, Inhabitants of, 145.
R. *v.* Bradford, Archdeacon of, 268.
R. *v.* Brain, 141.
R. *v.* Brandt, 188.
R. *v.* Byrom and another, 169, 194, 220.
R. *v.* Carpenter, 256.
R. *v.* Castle View, Leicester, 180.
R. *v.* Catesby, 21.
R. *v.* Chapman, 387.
R. *v.* Cheere, 382.
R. *v.* Chester, Archdeacon of, 107, 129, 130, 131.
R. *v.* Chichester, Bishop of, 374.
R. *v.* Christchurch, Middlesex, Overseers of, 142, 143.
R. *v.* Clapp, 6.
R. *v.* Clayton, 3.
R. *v.* Cockburn, 188.
R. *v.* Coleridge, 382, 384, 386.
R. *v.* Collins and another, Justices of Durham, 195, 222, 223, 225.
R. *v.* Consistory Court of London, Official Principal of, 172, 263, 267.
R. *v.* Cooper, 121.
R. *v.* Corfe, 26, 41.
R. *v.* Corfe Mullen, 37.
R. *v.* Coventry, Archdeacon of, 23, 43.
R. *v.* Crook, 169, 194, 220, 223, 228.
R. *v.* Croydon, Churchwardens of, 143.
R. *v.* Dalby, 175, 249, 319.
R. *v.* Daubeny, 44.
R. *v.* Davies, 147.
R. *v.* Derby, Overseers of, 181.
R. *v.* D'Oyly, D.D., 108, 109, 119, 130, 136, 165.
R. *v.* Dursley, Churchwardens of, 210, 256, 268, 269, 270, 273.
R. *v.* Earl Shilton, 21.
R. *v.* Eastern Counties Railway Company and Overseers of Moulton, 193, 220.
R. *v.* Essex, Inhabitants of, 274.
R. *v.* Essex, Justices of, 232.
R. *v.* Exeter, Mayor of (Dipstale's case), 6.
R. *v.* Exeter, Mayor of (Westcomb's case), 6.
R. *v.* Fall and others, 132.
R. *v.* Fenton and others, 217, 242, 246.
R. *v.* Flintshire, Justices of, 232.
R. *v.* Ford and others, 218, 219.
R. *v.* Fox and others, 382.
R. *v.* Freeman, 42.

R. *v.* Frost, 166.
R. *v.* Gaskill, 188.
R. *v.* Gaskin, 147.
R. *v.* Gayor, 11, 12.
R. *v.* Gifford, 148.
R. *v.* Gladstone and eight others, 142.
R. *v.* Goole, in the county of York, Minister and Churchwardens of, 119.
R. *v.* Graham, 127.
R. *v.* Great Western Railway Company (Burham Rates) 274.
R. *v.* Green, 183.
R. *v.* Hall, 6, 8.
R. *v.* Hammersmith, Vicar and Churchwardens of, 119, 132.
R. *v.* Harris, Dr., 40.
R. *v.* Harwood, 42.
R. *v.* Haworth, Chapelwardens of, 175, 319.
R. *v.* Hedger and others, 124.
R. *v.* Hewitt, 296.
R. *v.* Hickman, 71.
R. *v.* Hillingdon, Vicar of, 118, 121.
R. *v.* Hinckley, 21.
R. *v.* Holy Trinity in Over Darwin, Vicar, &c., of, 125, 126.
R. *v.* How, 124.
R. *v.* Huntsworth, 224, 257, 279.
R. *v.* Hurstbourne Tarrant, 256.
R. *v.* Ipswich, Justices of, 38, 217, 221, 231, 245.
R. *v.* Jeffreys, 231.
R. *v.* Jones, 188.
R. *v.* Kingsclere, 154, 155.
R. *v.* Kirby, 114.
R. *v.* Knox and others, 227.
R. *v.* Lambeth, Churchwardens and Overseers of, 132.
R. *v.* Leicester, Justices of, and Compton, 227.
R. *v.* Leominster, Inhabitants of, 217.
R. *v.* Lewis, Clerk, 34.
R. *v.* Liverpool, Inhabitants of, 153, 155.
R. *v.* Lynn, 382.
R. *v.* Maddern, 283.
R. *v.* Manchester, Overseers of, 188.
R. *v.* Manchester, Township of, 180.
R. *v.* Marriott, 101.
R. *v.* Marsh, 3, 23, 37, 38, 45, 175, 246.
R. *v.* Maude and another, Justices of Manchester, 393.
R. *v.* Mayby, 296.
R. *v.* Micklefield, 274.
R. *v.* Middlesex, Archdeacon of, 41, 42, 45.
R. *v.* Middlesex, Justices of, 110.
R. *v.* Millard, 174.
R. *v.* Milnrow, Chapelwardens of, 220, 222.
R. *v.* Mirehouse, 219.
R. *v.* Moorhouse, James, 381.
R. *v.* Munday (Cowp.), 116.
R. *v.* Munday (1 East), 182.
R. *v.* Murphy, 322.
R. *v.* Nantwich, 3.
R. *v.* Nunneley, 222, 223.
R. *v.* O'Neil, 348.
R. *v.* Ossett, The Inhabitants of the Township of, 149.
R. *v.* Pedler, 224.
R. *v.* Perry, 30.
R. *v.* Peterborough, Mayor of, 125, 166.
R. *v.* Peters (Clerk), 142.
R. *v.* Phillips and another, 188.
R. *v.* Pickles and Anderson, 319, 322.
R. *v.* Player, 116.
R. *v.* Pocock, 188.
R. *v.* Ponsonby, 180.
R. *v.* Powell, Evan, 107.
R. *v.* Poynder, 8.
R. *v.* Raven (Clerk), 8.
R. *v.* Read and others, 274, 279, 441.
R. *v.* Rice, 15, 40, 41, 49.
R. *v.* Ricketts, 296.
R. *v.* Roberts and another, Justices of Surrey, and Richard May, 161, 162, 163, 258.

R. *v.* Robinson (Clerk), *Ex parte* Oxford, 119.
R. *v.* Rogers, Wakefield and others, 235.
R. *v.* St. Bartholomew-the-Great, Churchwardens of, 138.
R. *v.* St. Bartholomew-the-Less, 182.
R. *v.* St. Clement's, Inhabitants of, 38, 217, 221, 231, 245.
R. *v.* St. Faith, Inhabitants of, 19, 22.
R. *v.* St. James's, Taunton, Churchwardens of, 154.
R. *v.* St. James's, Westminster, 27, 136.
R. *v.* St. John the Baptist, Cardiff, Churchwardens of, 310.
R. *v.* St. John Westgate and Elswick, Newcastle-upon-Tyne, Burial Board of, 73.
R. *v.* St. Katherine's, Gloucester, 282.
R. *v.* St. Luke's, Occupiers of, 182.
R. *v.* St. Margaret and St. John's, Westminster, 310, 318.
R. *v.* St. Margaret's, Leicester (8 *A. & E.*), 322.
R. *v.* St. Margaret's, Leicester (10 *A. & E.*), 167.
R. *v.* St. Martin-in-the-Fields, Churchwardens of, 138.
R. *v.* St. Martin's, Leicester, Inhabitants of, 180.
R. *v.* St. Mary, Lambeth, Churchwardens of (3 *B. & Ad.*), 255, 321.
R. *v.* St. Mary, Lambeth, Churchwardens of (1 *A. & E.*), 108, 129.
R. *v.* St. Mary, Lambeth, Churchwardens of (7 *Law Times*), 207.
R. *v.* St. Mary, Lambeth, Rector of, 122.
R. *v.* St. Mary-le-bone, Vestry of, 136.
R. *v.* St. Mary, Newington, Governors of, 116, 117, 125.
R. *v.* St. Michael, Pembroke, Churchwardens of, 256.
R. *v.* St. Michael, Southampton, Churchwardens of, 254, 256, 257, 272.
R. *v.* St. Pancras (New Church), Trustees of, 136.
R. *v.* St. Pancras, Vestrymen of (1 *A. & E.*), 136.
R. *v.* St. Pancras, Vestrymen of (11 *A. & E.*), 124, 136.
R. *v.* St. Peter's, Thetford, 310.
R. *v.* St. Saviour's, Southwark, 322.
R. *v.* St. Stephen's, Coleman Street, Vicar, &c., of, 167, 305.
R. *v.* Salop, Justices of (2 *N. & P.*; 6 *Dow.*), 101.
R. *v.* Salop, Justices of (29 *L. J. M. C.*), 227.
R. *v.* Sandwich, 283.
R. *v.* Scott, 382.
R. *v.* Shee and others, 180.
R. *v.* Shepherd, (4 *T. R.*), 44.
R. *v.* Shepherd (1 *Q. B.*), 180.
R. *v.* Shrewsbury, Justices of, 219.
R. *v.* Sillifant, 220, 226, 272, 319.
R. *v.* Simpson, 40.
R. *v.* Smith, 147.
R. *v.* Smith, Henry, 180.
R. *v.* Sparks, 377, 381.
R. *v.* Spurrell, 9
R. *v.* Staffordshire, Justices of, 231, 233.
R. *v.* Staffordshire, Justices of, and the Overseers of Kingswinford, 4.
R. *v.* Staffordshire, Justices of, *Ex parte* The Churchwardens of Abbotts Bromley, 231, 240.
R. *v.* Stepney, Churchwardens of, 214.
R. *v.* Stephens, Dr., Chancellor of Bangor, 43, 130, 164.
R. *v.* Stevens (Clerk), and another, 33.
R. *v.* Stewart, 180.
R. *v.* Stewart and another, 382, 394.
R. *v.* Stock, 199.
R. *v.* Stoke Damarel, 153, 154.

R. *v.* Street, 274.
R. *v.* Stretfield and Dixon, 159, 218.
R. *v.* Stubbs, 5, 148.
R. *v.* Summers, Lord, 180.
R. *v.* Sussex, Justices of, 232.
R. *v.* Sutton, Lancashire, Overseers of, 127.
R. *v.* Taylor, 382, 384, 386.
R. *v.* Thame, Churchwardens of, 154.
R. *v.* Thetford, Inhabitants of, 318.
R. *v.* Thomas and another, 313, 319, 320.
R. *v.* Thorogood, 234, 242, 246, 296.
R. *v.* Thruston, 184.
R. *v.* Tower Hamlets, Commissioners of Sewers for, 274.
R. *v.* Trinity Chapel, Dublin, Dean and Chapter of, 387.
R. *v.* Twiss, 356.
R. *v.* Twitty, 42.
R. *v.* Venn, 394.
R. *v.* Wakefield, Vicar of, 132.
R. *v.* Wakefield and another, 222, 235.
R. *v.* Ward, Dr., 40.
R. *v.* West Riding, Justices of, 232.
R. *v.* Whipp, 101.
R. *v.* Whitchurch, 37, 38.
R. *v.* White, 42.
R. *v.* Williams (8 *B. & C.*), 42.
R. *v.* Williams (19 *L. J., M. C.*), 230.
R. *v.* Willim and Cross, Churchwardens of Bilston, 3, 210, 253.
R. *v.* Wilson, 185.
R. *v.* Wilson, Erasmus, 147.
R. *v.* Winchester, Commissary of the Bishop of, 126.
R. *v.* Wix, 21, 33.
R. *v.* Woodman and another, 137.
R. *v.* Wrottesley, 222.
R. *v.* Yorkshire, Justices of North Riding, 3, 178.
Redhead *v.* Wait and others, 361, 369.
Rew *v.* Pettitt, 80.
Reynolds *v.* Monkton, 323, 326, 347.
Rich *v.* Bushnell, 366, 386.
Rich, D.D., *v.* Garvard and Loder, 427.
Richards *v.* Birley, 119, 122, 132, 295.
Richards *v.* Dyke, 234, 221.
Richards *v.* Fincher, 426.
Richardson, app., *v.* Gladwin, resp., 112, 114, 133, 174, 237.
Ricketts *v.* Bodenham, 234, 245.
Rippin *v.* Bastin, 210, 243, 259.
Ritchings *v.* Cordingley, 246, 361, 433.
Roberts, app., *v.* Drewett, resp., 146.
Robinson *v.* Purdy, 225.
Rogers *v.* Davenant, 248.
Rosier's case, 351.
Rudd *v.* Forster, 3.
Rugg *v.* Kingsmill, 200.
Rugg *v.* Kingsmill (*P., C.*), 200, 385.
Rugg *v.* Winchester, Bishop of, 202, 376,
Rumball and Gough *v.* Mant, 71.
Rumbold, *Ex parte*, 386.
Russell Institution, Governors of, app., St. Giles-in-the-Fields and St. George's Bloomsbury, resps., 188.
Rutland, Duke of, *v.* Bagshawe and another, 74.

S.

St. Columb, Londonderry, Cathedral Church of, *In re*, 325, 328, 334.
St. David's, Bishop of, *v.* De Rutzen, 355.

St. Faith, *In re* the churchwardens of, 160.
St. George's, Hanover Square, Rector of, *v.* Stewart, 354.
St. John's, Margate, Churchwardens of, *v.* The Parson, &c., of same parish, 200, 304.
St. John's, Walbrook, Rector and Churchwardens of, *v.* The Parishioners of, &c., 354.
St. Margaret, Rochester, Burial Board of, *v.* Thompson, 69, 155.
St. Martin's, Birmingham, Rector of, *Ex parte*, 73.
St. Michael's, Cambridge, R. pros., Overseers of, *v.* Henry Smith, 180.
St. Michael's, Oxford, Churchwardens of, *v.* Luff, 119.
St. Nicholas, Deptford, Churchwardens of, *v.* Sketchley, 71.
St. Olave, Exeter, *Re* Churchwardens of, 57, 380.
St. Pancras Burial Board, *In re*, 73.
St. Pancras, Vestry of, *v.* Vicar and Churchwardens of St. Martin-in-the-Fields, 355.
St. Thomas's Hospital, Governors of, *v.* Stratton and others, 181.
St. Thomas's Hospital, Governors of, *v.* Treherne and Cove, 1, 21, 45.
Sanderson *v.* Harrison, 39.
Saunders *v.* Head, 374.
Scadding *v.* Lorant, 38, 108, 217.
Scale *v.* Veley and Joslin, 195, 313, 315.
Scott, app., *v.* The Churchwardens of St. Martin-in-the-Fields, resp., 188.
Seager *v.* Bowle, 365.
Sewell and another *v.* Twyford and Mann, 192.
Shaw *v.* Hislop, 86.
Shepherd and another *v.* Payne and another, 267, 382.
Sheppard *v.* Bennett, 413, 414, 415.
Shirley *v.* Brown, 23.
Shore *v.* Barnes, 426.
Sieveking and Evans *v.* Kingsford, 201.
Skingley *v.* Surrige, 241.
Smallbones *v.* Edney and Lunn, 176, 210, 287, 291.
Smith's, Rev. W. G. P., case, 59, 63.
Smith *v.* Atkins, 71.
Smith *v.* Birmingham, 180.
Smith *v.* Deighton, 105, 249.
Smith and Moze *v.* Keats, 175, 178, 179, 180, 182, 185.
Smith and Willis *v.* Dixon, 167, 275, 277, 278, 282, 288, 289.
Snowden *v.* Herring, 443.
Soane *v.* Ireland and others, 154.
Somerville *v.* Mirehouse and another, 241.
Sowerby *v.* Fryer, 360.
Speer *v.* Burder, 427.
Spooner *v.* Brewster, 364.
Sprott *v.* Powell, 134.
Spry *v.* The Directors and Guardians of Mary-le-bone, 382.
Spry *v.* Emperor, 383.
Spry *v.* Flood, 326, 330, 332.
Spry *v.* Gallop, 382, 383, 384.
Stafford, *Ex parte*, 93, 213, 322.
Stampe's case, 39.
Starkie *v.* Barton, 364.
Stead *v.* Heaton, 175, 319.
Stebbing *v.* The Metropolitan Board of Works, 356.
Stephenson *v.* Langston, 7, 8, 11, 13, 46.
Stevens, *Ex parte*, 161, 163.
Stevens *v.* Woodhouse, 332.
Steward *v.* Bateman, 74, 243.
Steward *v.* Francis, 74, 313, 315, 316.
Still and Bunn *v.* Palfrey, 167, 245, 264.
Stone's case, 39.
Story *v.* Colk and Preedy, 37, 44, 116, 118, 438.
Stoughton *v.* Reynolds, 25, 37, 39, 128, 129, 130.

Strachy *v.* Francis, 360, 365.
Stutter *v.* Freston, 2, 33.
Sumner *v.* Wix, 58, 399.
Sweetman, app., Gibbs, resp., 213.

T.

Tann and Clithero *v.* Owen, 260.
Tattersall *v.* Knight, 198.
Taylor *v.* Devey, 292, 293.
Taylor *v.* Manley, 357, 358.
Tear *v.* Freebody, 118.
Thakenham sequestration moneys, *In re*, 427.
Thompson and Sandford *v.* Cooper, 190, 191, 244, 281, 282, 286, 288.
Thursfield *v.* Jones, 183.
Tiarks and Fenning *v.* Hutton, 84, 118, 161, 164, 263, 265, 274, 276, 443.
Titchmarsh *v.* Chapman, 374, 388, 390, 391.
Todd, *Re*, 377, 388.
Topsall *v.* Ferrers, 383.
Tottenham, Vicar and Churchwardens of, *v.* Venn and another, 200.
Tozer *v.* Child (*N. P.*), 271, 272.
Tozer *v.* Child (*Q. B.*), 195.
Tozer *v.* Child (*Scac. Cam.*), 115.
Tracey *v.* Taylor, 182.
Trower *v.* Hurst, 427.
Tuckniss *v.* Alexander, 30, 384, 395.
Turner *v.* Baynes, 38, 217.
Turner *v.* Hanwell, Rector, &c., of, 202.
Turney *v.* Dodwell, 273.

U.

Uthwait *v.* Elkins, 71.

V.

Vanacre *v.* Spleen, 21.
Varty and Mopsey *v.* Nunn, 33, 80, 275, 276, 284, 286, 287, 294, 299, 384.
Vaughan *v.* Imray, 159.
Vaughan *v.* The South Metropolitan Cemetery Company, 384.
Veley *v.* Burder, (*Scac. Cam.*), 75, 97, 244, 249, 300, 306, 309, 310, 312, 320.
Veley *v.* Gosling, (*Consist. London*), 120, 195, 313, 320.
Veley *v.* Gosling (*Arches*), 310, 313, 320.
Veley *v.* Pertwee and another, 87, 428.
Voysey *v.* Martin, 395.
Voysey *v.* Noble, 410, 411, 425.

W.

Walpole *v.* Coldwell, 145.
Walsh *v.* Southwell and others, 3.
Walter *v.* Guner and Drury, 325, 332.
Walter *v.* Montague and Lamprell, 71, 73, 78, 198, 354.
Wandsworth, *Re* Church Estate Charity, 97.
Ward *v.* Clark, 71.
Waring *v.* Griffiths, 385.
Warner's case, 25.
Warner *v.* Gater, 104, 199, 280.
Watney *v.* Lambert and Simpson, 168, 195, 196, 281.
Wenmouth *v.* Collins, 356, 357.
Westerton *v.* Davidson, 44, 117, 126.
Westerton *v.* Liddell, 20, 50, 51, 53, 55, 58, 59, 62, 67.
Wetherall and Courthorpe, *In re*, 245.
Wheeley *v.* Lambert, 23.
White *v.* Steel, 98, 125, 253.
White and Jackson *v.* Beard, 169, 173, 191, 195, 231, 234, 277, 282, 286, 294, 295.

White and others *v.* Bowron, 63.
Williams, *Ex parte*, 243, 357.
Williams's case, 374.
Williams *v.* George and Nunn, 210, 245, 439.
Williams *v.* Glenister, 347.
Williams *v.* Salisbury, Bishop of, 412.
Willymott's case, 169.
Wilson's case, 39.
Wilson *v.* Fendall, 412.
Wilson *v.* McMath, 20, 109, 165, 166.
Wilson and others, apps., *v.* The Churchwardens of the Parish of Sunderland near the Sea, resps., 6, 213, 234, 237.
Winfield, *Ex parte*, 42.
Woodcock *v.* Gibson, 21, 71.
Woodward *v.* Makepeace, 170, 174.
Worth *v.* Terrington, 353, 347, 358.
Wrench *v.* Lord, 71.
Wyllie *v.* Mott and French, 332.
Wynn *v.* Davis and Weever, 395.

Y.

York's, Dean of, case, 374.

LIST

OF

STATUTES, RUBRICS AND OFFICES OF THE CHURCH, ARTICLES OF RELIGION, CANONS, HOMILIES, INJUNCTIONS, AND ADVERTISEMENTS,

CITED OR REFERRED TO.

STATUTES.

13 Ed. 1, stat. 4 (*Circumspecte Agatis*), pp. 75, 214, 301, 312.
35 Ed. 1, stat. 2 (*Ne Rector Prosternat*), p. 360.
9 Ed. 2 (*Articuli Cleri*), p. 75.
5 H. 8, c. 6, p. 11.
23 H. 8, c. 9, s. 3, p. 243.
24 H. 8, c. 12, p. 243.
25 H. 8, c. 19, pp. 20, 243.
32 H. 8, c. 40, p. 11.
2 & 3 Ed. 6, c. 1, pp. 62, 349, Appendix, xlix, li.—s. 2, pp. 399, 410.
5 & 6 Ed. 6, c. 1, s. 5, Appendix, li.
5 & 6 Ed. 6, c. 4, p. 357.—s. 1, p. 357.—s. 2, p. 357.
1 Mary 1, stat. 2, c. 3, p. 349.
1 Eliz. c. 1, p. 349.
1 Eliz. c. 2, pp. 66, 349, Appendix, l.—s. 2, pp. 399, 410.—s. 6, p. 381.—s. 17, p. 381.—s. 19, p. 67.
4 Eliz. c. 43.—s. 34, p. 242.
23 Eliz. c. 1, p. 381.
43 Eliz. c. 2, p. 3.
12 & 13 Car. 2, c. 4.—s. 24, p. 381.
13 & 14 Car. 2, c. 4, pp. 66, 67.—s. 22, p. 381.—s. 23, p. 381.—s. 24, pp. 399, 410.
22 & 23 Car. ii. (local), p. 93.
1 W. & M. c. 18, p. 350.
1 & 2 W. & M. c. 18, p. 373.

1 W. 3, sess. 1, c. 13.—s. 7, p. 14.
1 W. 3, sess. 1, c. 18, p. 13.
6 W. 3, c. 4, p. 12.
7 & 8 Will. 3, c. 34, pp. 230, 235, 237.—s. 3, p. 237.—s. 4, pp. 235, 237, 239.
10 & 11 W. 3, c. 28.—s. 2, p. 15.
10 Anne, c. 11, pp. 135, 136.
1 G. 1, stat. 2, c. 6, pp. 230, 239.—s. 2, pp. 236, 239.
5 G. 1, c. xix. (local), p. 141.
18 G. 2, c. 15, p. 12.
26 G. 2, c. 33, p. 396.
27 G. 2, 20.—s. 1, p. 230.—s. 2, p. 230.—s. 3, p. 230.
18 G. 3, c. lxxiv. (local and public), p. 143.
31 G. 3, c. 32.—s. 7, pp. 10, 14.—s. 8, pp. 10, 11.
42 G. 3, c. 90.—s. 174, p. 12.
43 G. 3, c. 108, p. 254.
48 G. 3, c. 75.—s. 1, p. 393.—s. 2, p. 394.—s. 3, p. 394.—s. 4, p. 394.—s. 5, p. 394.—s. 6, p. 394.—s. 7, p. 394.—s. 10, p. 394.
51 G. 3, c. 115, p. 254.—s. 2, p. 254.
52 G. 3, c. 146, pp. 69, 438.—s. 5, p. 69.
52 G. 3, c. 155, p. 373.—s. 9, pp. 10, 11.—s. 99, p. 13.
53 G. 3, c. 127, pp. 38, 230, 234, 237, 246, 295, 310.—s. 6, pp. 235, 236.—s. 7, pp. 215, 226, 236, 237, 238, 239, 242.—s. 12, p. 240.
54 G. 3, c. cxiii. (local),—s. 3, pp. 116, 124.
54 G. 3, c. 170.—s. 11, p. 286.—s. 12, pp. 228, 239.
55 G. 3, c. 68, p. 199.
56 G. 3, c. xxxix. (local), p. 30.
56 G. 3, c. lv. (local), pp. 93, 94.
57 G. 3, c. 93, p. 228.—s. 1, pp. 228, 239.—s. 2, pp. 228, 229.
58 G. 3, c. 45, pp. 4, 28, 81, 103, 106, 148, 149, 207, 250, 251, 252, 267, 270, 272, 294, 343, 392.—s. 14, p. 207.—s. 31, p. 32.—s. 59, pp. 204, 207, 251, 253, 254.—s. 60, pp. 205, 207, 254.—s. 61, p. 207.—s. 62, p. 343.—s. 63, pp. 147, 337.—s. 64, pp. 149, 343.—s. 65, p. 343.—s. 66, p. 343.—s. 70, pp. 80, 81, 138, 172.—s. 71, pp. 80, 81, 171, 172, 294.—s. 73, pp. 4, 16, 27, 47, 338, 340.—s. 74, p. 4.—s. 75, pp. 207, 337.—s. 76, p. 337.—s. 77, p. 337.—s. 78, p. 338.—s. 79, p. 338.—s. 80, p. 392.
58 G. 3, c. 69, pp. 26, 69, 99, 111, 112, 113, 116, 118, 120, 161,

Appendix, i.—s. 1, pp. 99, 106.—s. 2, pp. 109, 110, 123, 127, 134, 166.—s. 3, pp. 113, 114.—s. 4, pp. 110, 122.—s. 5, Appendix, ii.—s. 6, pp. 132, 149, 166, 214.—s. 8, p. 159.—s. 9, p. 150.—s. 10, p. 156.

59 G. 3, c. 12, pp. 70, 137, 139.

59 G. 3, c. 85, pp. 26, 99, 111, 112, Appendix, iv.—s. 1, p. 110.—s. 2, p. 114.—s. 3, p. 110, Appendix, ii.

59 G. 3, c. 134, pp. 4, 30, 81, 103, 105, 106, 148, 207, 250, 251, 269, 343.—s. 6, pp. 147, 156.—s. 10, pp. 149, 156.—s. 11, pp. 149, 156.—s. 14, pp. 208, 252.—s. 16, pp. 30, 149.—s. 21, p. 148.—s. 22, pp. 254, 392.—s. 23, p. 4.—s. 24, pp. 205, 207, 208.—s. 25, pp. 206, 208, 253, 254.—s. 26, p. 343.—s. 27, p. 343.—s. 30, pp. 4, 28, 136, 138, 343.—s. 31, p. 343.—s. 32, p. 338.—s. 33, p. 343.—s. 36, pp. 254, 392.—s. 37, pp. 254, 392.—s. 38, pp. 254, 392.—s. 39, pp. 199, 201, 392.—s. 40, p. 208.

3 G. 4, c. 72, p. 81.—s. 5, p. 209.—s. 6, p. 209.—s. 10, pp. 82, 136, 137.—s. 20, p. 81.—s. 21, p. 294.—s. 23, p. 343.—s. 24, p. 339.—s. 25, p. 343.—s. 26, pp. 253, 254, 392.

4 G. 4, c. 76, p. 395.—s. 2, p. 396.—s. 6, p. 69.

5 G. 4. c. 36, pp. 176, 240, 257, 259, 291, 321.—s. 1, p. 209.—s. 2, pp. 209, 214, 246.—s. 3, pp. 210, 214.

5 G. 4, c. 103, pp. 17, 72, 82.—s. 5, pp. 149, 156, 209.—s. 6, p. 209.—s. 9, p. 209.—s. 10, pp. 82, 209, 343.—s. 14, p. 72.—s. 15, pp. 82, 343, 392.

5 G. 4, c. cxxv. (local), p. 120.

6 G. 4, c. 50, p. 37.

6 G. 4, c. 60, p. 13.

7 G. 4, c. 72.—s. 6, p. 10.

7 G. 4. c. 84, p. 15.

7 & 8 G. 4, c. 16, p. 228.

7 & 8 G. 4, c. 53.—s. 11, p. 12.

7 & 8 G. 4, c. 72.—s. 2, p. 392.

10 G. 4, c. 7.—s. 10, p. 10.—s. 12, p. 10.—s. 13, p. 10.

1 W. 4, c. lvii. (local and public), p. 176.

1 & 2 W. 4, c. 38, pp. 4, 16, 17, 29, 72, 82.—s. 2, pp. 82, 83.—s. 4, p. 339.—s. 9, p. 72.—s. 16, pp. 4. 16, 28, 47, 144, 149, 156, 340.—s. 22, p. 340.—s. 23, pp. 4, 5, 80, 81.—s. 25, pp. 16, 29, 47, 80, 81.—s. 31, p. 343.—s. 33, pp. 16, 28.

1 & 2 W. 4, c. 60, pp. 27, 124, 135, 136, 156, Appendix, vi.

2 W. 4, c. l. (local and public), p. 274.

2 & 3 W. 4, c. 71, p. 20.
2 & 3 W. 4, c. 92, p. 243.
2 & 3 W. 4, c. 93, pp. 246, 296, 312.—s. 1, p. 296.—s. 2, p. 297.—s. 3, p. 297.
3 & 4 W. 4, c. 30, p. 189.—s. 1, p. 185.—s. 2, p. 186.
3 & 4 W. 4, c. 41, p. 243.
4 & 5 W. 4, c. 76.—s. 48, p. 9.
5 & 6 W. 4, c. 50, p. 199.
5 & 6 W. 4, c. 62.—s. 9, pp. 2, 36, 37, 38, 47, 372.
5 & 6 W. 4, c. 74, pp. 236, 298.
5 & 6 W. 4, c. 76.—s. 15, p. 4.
6 & 7 W. 4, c. 71, p. 434.
6 & 7 W. 4, c. 85, p. 29.—s. 30, p. 29.—s. 33, p. 439.
6 & 7 W. 4, c. 86.—s. 1, p. 69.—s. 30, p. 69.
6 & 7 W. 4, c. 96, pp. 192, 194.
7 W. 4 & 1 Vict. c. 45, p. 99.—s. 2, p. 100.—s. 3, pp. 100, 108, 109.
1 Vict. c. 22.—s. 18, p. 12.
1 Vict. c. 69, p. 434.
1 & 2 Vict. c. 64, p. 434.
1 & 2 Vict. c. 106, p. 426.—s. 29, p. 427.—s. 30, p. 427.—s. 32, p. 426.—s. 33, p. 425.—s. 43, p. 426.—s. 98, p. 417.—s. 99, p. 435.—s. 100, p. 435.—s. 124, p. 44.
1 & 2 Vict. c. 107, p. 17.
2 & 3 Vict. c. 49, p. 30.—s. 3, p. 149.
2 & 3 Vict. c. 62, p. 434.
3 Vict. c. 15, p. 434.
3 & 4 Vict. c. 60, p. 82.—s. 8, p. 136.—s. 15, p. 82.
3 & 4 Vict. c. 86, pp. 145, 374, 377, 428.—s. 6. p. 378.
3 & 4 Vict. c. 89, p. 191.
3 & 4 Vict. c. 93, p. 296.
4 & 5 Vict. c. 36, pp. 236, 298.
5 & 6 Vict. c. 54, p. 234.
6 & 7 Vict. c. 36.—s. 1, p. 186.—s. 2, p. 186.—s. 3. p. 187.—s. 5, p. 187.—s. 6, p. 187.
6 & 7 Vict. c. 37 (The New Parishes Act, 1843), pp. 4, 16, 17, 29, 72, 83, 149, 294, 341, 342.—s. 15, p. 83.—s. 17, pp. 4, 5, 16, 29, 47, 83.
6 & 7 Vict. c. 67, pp. 319, 320.—s. 2, p. 320.—s. 3, p. 320.
7 & 8 Vict. c. 59, pp. 149, 154.—s. 2, pp. 149, 150.—s. 3, p. 150.—s. 5, pp. 146, 147, 151.—s. 6, p. 152.

7 & 8 Vict. c. 66.—s. 2, p. 9.—s. 13, p. 9.
7 & 8 Vict. c. 94 (The New Parishes Act, 1844), pp. 4, 72, 83, 149, 294, 341, 342.
7 & 8 Vict. c. 101.—s. 31, p. 395.
8 & 9 Vict. c. 70, p. 4.—s. 6, pp. 4, 16, 17, 18, 30, 47, 160, 348.—s. 7. pp. 4, 17, 18, 27, 31, 47.—s. 8, p. 4.—s. 13, p. 72.—s. 14, p. 254.
8 & 9 Vict. c. 85.—s. 12, p. 13.
9 & 10 Vict. c. 73, p. 434.
10 & 11 Vict. c. 34.—s. 103, p. 385.
10 & 11 Vict. c. 65, p. 392.
10 & 11 Vict. c. 104, p. 434.
11 & 12 Vict. c. 43, pp. 229, 231, 239.—s. 11, pp. 213, 218.—s. 19, p. 230.—s. 22, p. 230.—Schedule (No. 2), p. 231.
11 & 12 Vict. c. 44.—s. 1, p. 241.—s. 2, p. 241.—s. 3, p. 241.
11 & 12 Vict. c. 63.—s. 82, p. 385.
12 Vict. c. 14, p. 296.
12 & 13 Vict. c. 1.—s. 1, p. 12.
12 & 13 Vict. c. 45, p. 232.—s. 1, p. 232.
12 & 13 Vict c. 67, p. 438.
13 & 14 Vict. c. 52, p. 393.
13 & 14 Vict. c. 57, pp. 98, 99, Appendix, xviii.—s. 1, p. 98.—s. 2, p. 99.
13 & 14 Vict. c. 72, p. 143.—s. 6, p. 143.—s. 7, p. 143.—s. 8, p. 143.
13 & 14 Vict. c. 99, pp. 111, 112, 132, 174, 191, 289.
14 & 15 Vict. c. 53, p. 434.
14 & 15 Vict. c. 97, pp. 83, 136.—s. 1, p. 340.—s. 2, p. 383.—s. 3, p. 383.—s. 4, p. 383.—s. 5, p. 383.—s. 6, p. 383.—s. 7, p. 83.—s. 8, p. 83.—s. 23, pp. 28, 135.
15 & 16 Vict. c. 28.—s. 10, p. 142.—s. 51, p. 142.
15 & 16 Vict. c. 36, p. 373.
15 & 16 Vict. c. 85, pp. 254, 393.—s. 32, p. 384.—s. 49, p. 395.
16 & 17 Vict. c. 65, p. 111, Appendix, v.
16 & 17 Vict c. 134, pp. 254, 393.—s. 5, p. 393.—s. 7, p. 142.
17 & 18 Vict. c. 87, pp. 254, 393.
18 & 19 Vict. c. 41, p. 350.
18 & 19 Vict. c. 63.—s. 1, p. 186.—s. 33, p. 186.
18 & 19 Vict. c. 79.—s. 1, p. 395.
18 & 19 Vict. c. 81, p. 373.
18 & 19 Vict. c. 86, p. 426.

18 & 19 Vict. c. 120 (Metropolis Local Management Act), pp. 156, 157, 158.—s. 1, p. 156.—s. 90, pp. 158, 159.
18 & 19 Vict. c. 127.—s. 13, p. 343.
18 & 19 Vict. c. 128, pp. 254, 393.—s. 18, p. 73.
19 & 20 Vict. c. 59, p. 373.
19 & 20 Vict. c. 104 (The New Parishes Act, 1856), pp. 4, 72, 83, 85, 149, 294, 341.—s. 5, p. 341.—s. 6, pp. 85, 341.—s. 7, pp. 85, 342.—s. 8, p. 343.—s. 9, pp. 149, 156.—s. 10, p. 72.—s. 11, p. 30.—s. 12, p. 30.—s. 14, pp. 29, 30, 81.—s. 15, pp. 83, 149.—s. 35, p. 4.
19 & 20 Vict. c. 112 (Metropolis Local Management Amendment Act), pp. 157, 158.—s. 1, p. 157.—s. 2, p. 157.—s. 3, pp. 157, 159.—s. 9, p. 158.
19 & 20 Vict. c. 119.—s. 12, p. 398.
20 & 21 Vict. c. 43, pp. 213, 237, 239.—s. 2, p. 233.—s. 4, p. 233.—s. 5, p. 233.
20 & 21 Vict. c. 81, pp. 254, 393.—s. 5, p. 384.—s. 23, p. 78.—s. 27, p. 165.
21 & 22 Vict. c. 81.—s. 23, p. 267.
21 & 22 Vict. c. 90, p. 12.—s. 18, p. 12.—Schedule (A), p. 12.
21 & 22 Vict. c. 104, p. 157.
22 Vict. c. 1, p. 393.—s. 1, p. 79.
22 Vict. c. 2, p. 428.
23 & 24 Vict. c. 32, pp. 350, 356, 388, Appendix, xxiv.—s. 1, p. 350.—s. 2, pp. 351, 352.—s. 3, p. 351.—s. 4, pp. 351, 357.
23 & 24 Vict. c. 51, p. 438.—ss. 1, 2, 3, 4, and part of Schedule, Appendix, xxvi, xxvii.
23 & 24 Vict. c. 64, p. 393,
23 & 24 Vict. c. 93, p. 434.
25 & 26 Vict. c. 100, p. 393.
25 & 26 Vict. c. 102, p. 157.
25 & 26 Vict. c. 103, pp. 191, 192, 194, 289.
29 & 30 Vict. c. 113.—s. 12, p. 10.
29 & 30 Vict. c. 118, p. 181.
30 & 31 Vict. c. 33 "The Consecration of Churchyards Act 1867," p. 254.
30 & 31 Vict. c. 59, p. 12.
30 & 31 Vict. c. 135, pp. 87, 203, 267, 428.—s. 1, 429.
31 & 32 Vict. c. 109 (The Compulsory Church Rate Abolition Act, 1868), pp. 73, 83, 87, 94, 168, 178, 212, 235, 243, 293, 301, 302, 319, 321.—s. 1, pp. 88, 92, 94, 183, 302.—s. 2,

pp. 88. 92, 94, 183.—s. 3, pp. 88, 92, 183, 204, 212, 440.—s. 4, pp. 89, 93, 183.—s. 5, pp. 89, 93, 94, 183, 212, 213.—s. 6, pp. 81, 84, 89, 94, 302, 319, 389.—s. 7, pp. 90, 94, 211.—s. 8, pp. 17, 90, 94, 113, 212.—s. 9, pp. 90, 95.—s. 10, pp. 92, 95, 96, 212.—s. 11, p. 92.

32 & 33 Vict. c. 40.—s. 1, pp. 188, 189.—s. 2, p. 189.—s. 4, p. 298.—s. 5, p. 298.

32 & 33 Vict. c. 41, pp. 26, 110, 111, 112, 174, Appendix, xxvii.—s. 3, p. 111.—s. 4, p. 111.—s. 6, pp. 111, 289.—s. 7, pp. 99, 111.—s. 8, p. 99.—s. 17, p. 133.—s. 18, p. 133.—s. 19, pp. 99, 110.—s. 20, p. 111.

32 & 33 Vict. c. 62, p. 312.—s. 4, p. 289.—s. 5, p. 298.

32 & 33 Vict. c. 71, p. 245.

32 & 33 Vict. c. 94.—s. 2, p. 343.—s. 3, p. 343.—s. 4, p. 343.—s. 5, p. 343.—s. 6, p. 343.—s. 7, p. 343.

33 & 34 Vict. c. 75 (The Elementary Education Act, 1870), p. 355.

33 & 34 Vict. c. 91, p. 426.

34 & 35 Vict. c. 33, p. 393.

34 & 35 Vict. c. 37 (The Prayer Book [Tables of Lessons] Act, 1871), p. 375.

34 & 35 Vict. c. 43 (The Ecclesiastical Dilapidations Act, 1871), p. 359.

34 & 35 Vict. c. 44 (The Incumbents Resignation Act, 1871), p. 427.

34 & 35 Vict. c. 46 (The Sequestration Act, 1871), p. 435.

34 & 35 Vict. c. 66 (The Private Chapels Act, 1871), p. 243.

34 & 35 Vict. c. 87 (The Sunday Observation Act, 1871), p. 373.

34 & 35 Vict. c. 91, p. 243.

35 & 36 Vict. c. 35 (The Act of Uniformity Amendment Act, 1872), pp. 375, 377, 381, Appendix, xxxii.

35 & 36 Vict. c. 36, p. 375.

35 & 36 Vict. c. 49 (The Church Seats Act, 1872), p. 343.

35 & 36 Vict. c. 96, p. 359.

36 & 37 Vict. c. 42, p. 423.

36 & 37 Vict. c. 50 (The Places of Worship Sites Act, 1873), p. 254.

36 & 37 Vict. c. 66 (The Supreme Court of Judicature Act, 1873) pp. 243, 410.—s. 24, p. 243.

36 & 37 Vict. c. 91, p. 215, Appendix, ii.

37 & 38 Vict. c. 54 (The Rating Act, 1874), p. 184.

37 & 38 Vict. c. 76, p. 191.
37 & 38 Vict. c. 83 (The Supreme Court of Judicature (Commencement) Act, 1874), p. 243.
37 & 38 Vict. c. 85 (The Public Worship Regulation Act, 1874), pp. 246, 429, 433, Appendix, xl.—s. 5, p. 432.—s. 7, p. 430.—s. 8, p. 430.—s. 9, p. 430.—s. 12, p. 432.—s. 14, p. 429. Rules and Orders, Appendix, lxxiv.

RUBRICS AND OFFICES OF THE CHURCH.

Rubric. To the order for the administration of the Holy Communion, 50, 57, 374, 380, 381, 404, 412.
——— Immediately following offertory sentences in the order for the administration of the Holy Communion, 55, 352.
——— Introductory to the Book of Common Prayer (The Ornaments Rubric), 59, 62, 64, 401, 402, Appendix, xlix, l, liii.
——— Directing the use of the surplice in the ordinary ministrations, 64.
——— To the order for the Visitation of the Sick, 69, 418.
——— At the end of the order for the administration of the Holy Communion, 348, 375.
Office. For the Burial of the Dead, 377, 387, 424.
——— For the Holy Communion, 280, 406.
——— For the Solemnization of Matrimony, 380, 396.
Rubric. To the office for the Burial of the Dead, 387, 424.
Office. For the Visitation of the Sick, 391.
Rubric. To the ministration of Public Baptism of Infants, 395.
——— To the ministration of Private Baptism of Infants, 395.
——— To the office of Matrimony, 395.
——— After Nicene Creed, 396.
——— Before the Prayer of Consecration, 404.
Office. Introductory sentences in the order for Morning Prayer, 416.
——— Absolution in the order for Morning Prayer, 417.
——— Collects, 417.
——— Collects next before the Epistle, 400.
——— Collects following Nicene Creed, 400.
——— Epistle, 400.
——— Prayer for the Church Militant, 405
——— Consecration Prayer in Holy Communion, 405.
——— Exhortation to the Holy Communion, 418.
Rubric. On the salvation of baptized children dying in their infancy, 424.
——— On the use of the sign of the Cross in Baptism, 424.
——— Table of Feasts to be observed, 406.

ARTICLES OF RELIGION.

Article 2, p. 411.
6, p. 380.
9, p. 411.
11, pp. 411, 425.
17, p. 416.
22, p. 62.
33, p. 424.

CANONS.

Can. 9, p. 367.
14, p. 374.
18, pp. 345, 417.
19, p. 346.
20, p. 56.
21, p. 375.
26, p. 412.
27, p. 412.
30, p. 424; Appendix, lxv.
45, p. 374.
50, p. 349.
52, p. 69.
53, p. 417.
55, p. 381.
58, pp. 57, 375.
59, p. 374.
62, p. 395.
67, p. 374.
68, pp. 20, 374, 387.
69, p. 375.
70, pp. 69, 438.
71, p. 426.
80, pp. 67, 440.
81, pp. 57, 395.
82, pp. 20, 50, 52, 57, 67.
83, p. 57.
84, p. 68
85, pp. 2, 50, 75, 344.
87, p. 69.
88, p. 353.
89, pp. 2, 18, 19, 25, 45. 442, 443.
90, pp. 2, 18, 19, 47, 373.
91, pp. 145, 146, 148.
99, p. 68.
111, p. 346.
116, p. 371.
117, p. 371.
118, pp. 37, 45, 47, 371.
119, pp. 45, 371.

HOMILIES.

Book 1, Homily 3, p. 425; Appendix, lxvii.

INJUNCTIONS

Of Ed. 6, pp. 58, 60.
Of Eliz. pp. 58, 66, 293.

ADVERTISEMENTS

Of Eliz. p. 66.

A PRACTICAL

GUIDE TO CHURCHWARDENS.

CHAPTER I.

On the offices of churchwarden and sidesman, the liabilities of parties to be chosen, their appointment, and admission.

SECTION I.

On the Offices of Churchwarden and Sidesman.

Churchwardens are officers of the parish in ecclesiastical affairs, as the constables are in civil (*a*). They are the guardians or keepers of the church, and the legal representatives of the parish body (*b*), and are also, to a certain degree at least, guardians of the moral character and public decency of the parish (*c*); and the main branches of their duty are—First, to present all matters happening in the parish contrary to the ecclesiastical

(*a*) Prid. 1.
(*b*) 1 Blac. Com. 394.
(*c*) *Griffiths* v. *Reed*, 1 Hag. Ec. 208; *Governors of St. Thomas's Hospital* v. *Treherne and Cove*, 1 Lee, 129.

laws (*a*); and, secondly, to keep in repair the church, to guard the various things belonging to the church, and to provide such things as may be necessary for the decent service of it (*b*).

Their duties seem originally to have been limited to such matters only as concern the church, considered *materially* as an edifice, building, or place of public worship, the duty of suppressing profaneness and immorality having been entrusted to two persons chosen by the parishioners as assistants to the churchwardens, who, from their power of inquiring into offences detrimental to the interests of religion, and of presenting the offenders to the next provincial council or episcopal synod, were called *questmen* or *synod's men*, which last appellation has been converted into the name of *sidesmen:* but great part of the duty of these questmen, in course of time devolved on the churchwardens (*c*); and it would seem from the canons 1603 (*d*); that at the date of those canons the offices of *churchwarden* and *questman* were one and the same—such churchwardens and questmen still, however, being assisted by two or three or more discreet persons in every parish, chosen for *sidesmen* or *assistants* (*e*). This office of sidesman, as an assistant to the churchwarden in matters relating to the moral character and public decency of the parish, is still recognized in our ecclesiastical constitution (*f*), though

(*a*) Prid. 1.
(*b*) Prid. 1; Hag. Con. 71.
(*c*) Par. Ant. 649.
(*d*) Can. 85, 89, 90; but however this may be, there can be no doubt that originally these offices were distinct. In *Stutter* v. *Freston*, 1 Str. 52, the court said, "Churchwardens were a corporation at common law, and they are different from questmen, who were the creatures of the Reformation, and came in by canon law."
(*e*) Can. 90.
(*f*) 5 & 6 Will. 4, c. 62, s. 9.

rarely, it is believed, now met with in practice, and only in some of the larger parishes (*g*).

Churchwardens are also *ex officio* overseers of the poor (*h*); this office of the overseer of the poor is however confined to the churchwardens of a *parish* or *reputed parish*, and has been held not to extend to the churchwardens of a township or chapelry maintaining its own poor, although such township or chapelry be a perpetual curacy supporting its own church and independent of the parish, except by the payment of a small annual sum towards the repair of the parish church (*i*).

Many additional temporal duties have also from time to

(*g*) But sometimes a sidesman is found in a parochial chapelry, where there is but one churchwarden, as in the parochial chapelry of Edenfield, in the parish of Bury, in the county of Lancaster. See *Ramsbottom* v. *Duckworth*, 1 Exch. 506.

(*h*) 43 Eliz. c. 2; Prid. 26, 27; Par. Ant. 649.

(*i*) *R.* v. *North Riding of Yorkshire JJ.*, 6 A. & E. 863. But see the correctness of this decision questioned by *Parke*, B., and *Alderson*, B., in *Walsh* v *Southwell and others*, 6 Ex. 150, 20 L. J. M. C. 165. To constitute a reputed parish there must be a parochial chapel, with all parochial rights entirely independent of the mother church, as to sacraments, marriage, sepulture, repairs, &c.: *Rudd* v. *Foster*, 4 Mod. 157; *R.* v. *Clayton*, 13 Q. B. 354; and see *Carr* v. *Mostyn*, 5 Ex. 69; *R.* v. *Willim and Cross, Churchwardens of Bilston*, 16 Q. B. 1. In such cases there *may* be a reputed parish,—*Hilton* v. *Paul*, Cro. Car. 92; *Nichols* v. *Walker*, Cro. Car. 394; *R.* v. *Clayton, supra*;—but it does not, therefore, of necessity follow that there *must* be one. The question whether there has heretofore been a separate maintenance of the poor by the district has always been considered an important ingredient in determining whether it is a reputed parish or not: *Price* v. *Quarrell*, 12 A. & E. 878; *R.* v. *Clayton supra*. As to the churchwardens or chapelwardens of a township or chapelry, not being a reputed parish, and when and to what extent they may be considered parochial officers, though acting for such township or chapelry only, see *R.* v. *Marsh*, 5 A. & E. 468; 5 N. & P. 668, S. C. See also *Astle* v. *Thomas*, 2 B. & C. 271, and *post*. "In truth there are properly no churchwardens of a township, but only of a chapelry." Per *Lord Ellenborough* in *R.* v. *Nantwich*, 16 East, 228.

time been thrown upon the churchwardens by modern Acts of parliament (*a*).

Besides the common law office of churchwarden, which is a *parochial* office, provision is made by the Church Building Acts, 58 Geo. 3, c. 45 (*b*), 59 Geo. 3, c. 134 (*c*), 1 & 2 Will. 4, c. 38 (*d*), and 8 & 9 Vict. c. 70 (*e*); and by the New Parishes Act, 1843, 6 & 7 Vict. c. 37 (*f*), for the appointment of churchwardens and chapelwardens for the respective churches and chapels built or appropriated under those Acts.

These of course are not *parochial* officers (*g*), and their duties are regulated by the respective Acts of parliament,

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(*a*) Par. Ant. 649. That a *parochial* churchwarden is bound as an *overseer of the poor* to sign the burgess list required by the 15th section of the Municipal Corporations Act, 5 & 6 Will. 4, c. 76, and will be liable to a penalty of 50*l.* if he omit to do so, see *Clarke* v. *Grant*, 8 Exch. 252, 22 L. J. Ex. 67.

(*b*) Sects. 73, 74.

(*c*) Sect. 30.

(*d*) Sects. 16, 23.

(*e*) Sects. 6, 7.

(*f*) Sect. 17. This Act and the 7 & 8 Vict. c. 94, to explain and amend it, are called respectively, "The New Parishes Act, 1843," and "The New Parishes Act, 1844," see 19 & 20 Vict. c. 104, s. 35, and are extended and amended by the last-named Act, called "The New Parishes Act, 1856." See the 35th section of that Act. The two former Acts are also called popularly "Sir *Robert Peel's* Acts," and the last named Act "Lord *Blandford's* Act."

(*g*) By 59 Geo. 3, c. 134, s. 23, it is expressly enacted that churchwardens or chapelwardens appointed under that Act, or under 58 Geo. 3, c. 45, shall not by virtue of their office, as such churchwardens or chapelwardens, be deemed overseers of the poor. And by 6 & 7 Vict. c. 37, s. 17, it is enacted, that nothing in that Act contained shall render any churchwardens appointed under that Act liable or competent to perform the duties of overseer of the poor in respect of such their office of churchwardens. In like manner, it is expressly provided by sect. 8 of 8 & 9 Vict. c. 70, that no churchwardens appointed under the provisions of that Act, shall in virtue of such office be deemed overseers of the poor. And see *R.* v. *Staffordshire JJ. and the Overseers of Kingswinford*, 23 L. T. 91, 2 W. R. 453.

and confined to the care and management of the matters relating to the churches and chapels to which they are appointed; but when a chapel of ease, with a district attached, is for ecclesiastical purposes constituted into a separate and independent parish church under 1 & 2 Will. 4, c. 38, s. 23, it is enacted that the churchwardens appointed under that Act shall "do all things pertaining to the office of churchwardens as to ecclesiastical matters, in like manner as though the same had been of old time a separate and distinct parish;" and by the 6 & 7 Vict. c. 37, s. 17, it is provided, "that every person chosen churchwarden of a new parish under that Act, shall do all things pertaining to the office of churchwarden as to ecclesiastical matters in the said new parish."

SECTION II.

As to the Persons liable to be chosen to the Office of Churchwarden, and the Persons disqualified and exempt from serving that Office.

Generally speaking all persons, *inhabitants* of the parish, are liable to serve the office of churchwarden (*h*); and from the cases of *Rex* v. *Stubbs* (*i*), in which it was held that a woman is not exempt from serving the office of overseer of the poor, and *Olive* v. *Ingram* (*k*), in which it was held that she may be a parish sexton, there may perhaps be some grounds for contending that a *woman* is not exempt from this duty. But however this may be in point of law, there can be little doubt that the

(*h*) Prid. 60.
(*i*) 2 T. R. 395; 1 Bott, 10.
(*k*) 2 Str. 1114.

courts would relieve her from the burden of serving, unless the necessity of the case required that she should do so (*a*).

The word *inhabitant* has in law various meanings; it sometimes means a *resident* occupier of property, sometimes an occupier of property generally, *whether resident or not* (*b*).

It is laid down by the early text writers that a churchwarden must be an inhabitant of the former description, that is, a *resident* inhabitant, and not merely an outsetter, who occupieth lands in the parish but doth not dwell therein (*c*); and the reason given by *Prideaux* is, because by the duty of his office he is obliged to be present at the parish church of which he is churchwarden on all Sundays and holidays to take notice of the absence of such parishioners as do not come to the said church, in order to present them for the same, and also to take care that no disorder be committed in the said church or in the churchyard during divine service and sermon, but that all things be kept in order and quiet, which he is incapable of duly performing as long as he lives out of the parish (*d*).

(*a*) 2 T. R. 995; 1 Bott, 10.

(*b*) *R.* v. *Clapp*, 3 T. R. 107; *R.* v. *Berwick*, 7 T. R. 33; *R.* v. *Hall*, 1 B. & C. 123, 2 Inst. 702. And see *Attorney-General* v. *Foster*, 10 Ves. 335; *Wilson and others*, apps., v. *The Churchwardens of the parish of Sunderland near the Sea*, resps., 34 L. J. (N. S.) M. C. 90; *R.* v. *Adlard*, 4 B. & C. 772.

(*c*) Prid. 60; see also Gibs. 215.

(*d*) *Ib.*; and see *R.* v. *Adlard*, 4 B. & C. 772, where it was held that to qualify a man for the office of constable it was not sufficient that he should be a householder, but that he must be a *resident* householder, because of the *personal* services which he would have to perform. As to what constitutes a *resident* householder, see *R.* v. *The Mayor of Exeter* (Wescomb's case), 4 L. R. Q. B. 110, and *R.* v. *The Mayor of Exeter* (Dipstale's case). *Ib.* 114.

It has, however, been decided in *Stephenson* v. *Langston* (*e*) in the Consistory Court of London, that a partner in a house of trade within a parish in the city of London, who is *himself* in the habit of attending to the business, is liable to serve, although he is not personally resident within the parish. This case was decided on the authority of *Brook* v. *Owen* (*f*), also a London case, and was afterwards, upon appeal on a collateral point, expressly approved, though of course not *judicially* affirmed, by Sir *William Wynne* in the Court of Arches; and although mention was made in the judgment of the court below, and also by Sir *W. Wynne*, of a custom in the city of London for non-resident inhabitants of the parish to serve parochial offices, the judgment does not appear to be based upon such custom, and the reasons assigned by Sir *W. Wynne* for upholding it are certainly of a general character, and equally applicable to other places.

"Here is a banker," said that learned civilian, "at the head of a company of bankers, in a parish in the city of London, occupying a house in which the business is carried on, and where Mr. *Langston* regularly attends. But he says, 'that he has a house in the country, and one also in another part of the town, where he takes his meals and sleeps.' He is at this house, however, in the city for business, and pays parochial taxes. Can it then be said that he shall not be liable to serve burdensome parochial offices?

"It would be hard, indeed, on the other parishioners if he were exempted, merely because for his own convenience and amusement he has a house elsewhere.

(*e*) 1 Hag. Con. Rep. 379.

(*f*) Court of Peculiars, A.D. 1717; 3 Phil. 517 (n); 1 Hag. Con. Rep. 380.

"What has been alleged in objection to this?—that the office of churchwarden is an office which requires personal attendance,—that the churchwarden manages the concerns of the parish, is overseer, &c. I do not, however, see why he cannot manage the temporal concerns of this office, as well as his own business, or why he cannot conveniently attend service in the church on Sunday. There are many persons who attend business six days in the week, and go into the country for the Sunday; and if they should be chosen churchwardens, and think that the duty of their oath calls upon them to attend the service of the church in the parish where they have been elected, they can attend as conveniently on that day as they do on the others for their own affairs" (*a*).

But a mere lodger or inmate is not qualified for the office of churchwarden (*b*), nor, as it is apprehended, does the occupation of land in the parish qualify for the office (*c*). To render a man liable to serve as churchwarden he must, as it is submitted, be a householder, personally occupying a house in the parish, though not, perhaps, necessarily resident therein (*d*).

(*a*) See also *R.* v. *Hall*, 1 B. & C. 123; *R.* v. *Poynder*, *Ib.* 178. It should be mentioned here, that is, *Stephenson* v. *Langston*, 1 Hag. Con. 379, the house stood in two parishes, but no objection to the defendant's liability to serve the office appears to have been taken on this ground.

(*b*) See *Ford* v. *Chauncey*, 1 Hag. Con. 382 (n); Anderdon on Churchwardens, 182 (n).

(*c*) So laid down by *Prideaux*, p. 60, and by Gibson in his Codex, 215; see *ante*, p. 6.

(*d* See *Ford* v. *Chauncey*, 1 Hag. Con. 382 (n). Anderdon on Churchwardens, 182 (n). It should, however, be mentioned that in *R.* v. *Raven*, *Clerk*, Bail Court, TT. 1861 (in which case the author was one of the counsel engaged), which was an application for a *mandamus* to the incumbent to appoint a churchwarden, on the ground that the person appointed was an occupier of land only, and also that the appointment was merely colourable, Mr. Justice *Hill*, who made the rule absolute on the second ground,

By the word "householder," is meant a person who occupies as *tenant*. A servant, who occupies a house of his master, in part payment of his services, and as subservient thereto and necessary for the performance thereof, and not merely as a matter of convenience, is not a householder (*e*).

Some few classes of persons, however, though actual householders within the parish, are disqualified from serving the office of churchwarden; and many others, though not actually disqualified, are by law exempt from that duty, and cannot be chosen into the said office, unless they are content voluntarily to bear the same (*f*).

In the *first* class may be included *aliens* (*g*), *denizens* (*g*), *children* (*g*), *persons who have been convicted of felony* (*g*), (*h*), *fraud* (*h*), or *perjury* (*h*), and *Jews* (*g*).

It would appear also from the language attributed to Lord Stowell in *Anthony* v. *Seger* (*g*), that that learned civilian was, when he delivered judgment in that case, under the impression that a *Roman Catholic* was disqualified from serving the office of churchwarden; but it is submitted that this opinion must have been expressed under a

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stated that he gave no opinion whether a man who was a mere ratepayer in respect of land was eligible,—his present opinion was that he was, but he gave no authorized opinion on the point, and if that had been the real question, he should have let the writ go, in order that the matter might be finally determined. And *quære* whether it would make any difference if such ratepayer were also a lodger or inmate within the parish.

(*e*) *R.* v. *Spurrell*, 35 L. J. (N. S.) M. C. 74; 2 L. R. Q. B. 72, S. C.

(*f*) Prid. 59.

(*g*) *Anthony* v. *Seger*, 1 Hag. 9. But this disqualification does not extend to aliens naturalized by Act of Parliament since the passing of 7 & 8 Vict. c. 66—see sect. 2—nor to persons who shall have been naturalized before the passing of that Act, and who shall have resided in the United Kingdom during five successive years—sect. 13; nor to an alien naturalized by the certificate of a principal secretary of state under that statute, unless, indeed, the privilege be specially excepted in and by the certificate.

(*h*) 4 & 5 Will. 4, c. 76, s. 48.

misapprehension of the law, and that a Roman Catholic, though probably not compellable to serve either in person or by deputy (*a*), may legally fill the office, if the parishioners think fit to elect him, and he himself is willing to do so. The 7th section of 31 Geo. 3, c. 32, which enables Roman Catholics on certain conditions to execute the office by deputy (*b*), and the 8th section of the same Act, and 9th section of 52 Geo. 3, c. 155, which exempt Roman Catholic clergymen on certain conditions from serving the office at all (*c*), evidently assume their liability and *à fortiori* their competence to serve; and this view is still further strengthened by the 6th section of 7 Geo. 4, c. 72 (an Act, *inter alia*, for regulating the elections of churchwardens in Ireland), by which it is provided that no Roman Catholic in Ireland shall be compelled or compellable to serve the office of churchwarden or chapelwarden, either in person or by deputy (*d*).

It should be added here that until recently the same person could not be appointed churchwarden and overseer of the same parish; but it is now provided by the 12th section of the Poor Law Amendment Act, 1866 (*e*) "that in any parish the same person may hold jointly the offices of churchwarden and overseer."

In the *second* class may be reckoned *peers of the realm*, who by reason of the dignity of their rank and their necessary attendance in the great council of the nation are exempted from the discharge of all inferior offices (*f*).

(*a*) *Vide post*, p. 14, and see *Adey* v. *Theobald*, 1 Curt. 447, *post*, p. 14.

(*b*) *Vide post*, p. 14. (*c*) *Vide post*, p. 11.

(*d*) And see 10 Geo. 4, c. 7, ss. 10, 12, 13. The learned judge may probably have had in his mind at the time the case of a *popish recusant convict*, who was disqualified from filling any public office or employment. See Burn's Ecclesiastical Law by Phillimore, vol. 3, pp. 164, 165 and the statute there referred to.

(*e*) 29 & 30 Vict. c. 113. (*f*) Gibs. 215.

Members of Parliament, who are likewise exempted for similar reasons (*g*).

Sheriffs, by reason of their being invested by the Queen's writ with the custody of counties (*h*).

Acting justices of the peace (*i*).

Aldermen, who have in like manner been held to be exempt from all parish offices, because they ought always to be present in their city to see to its good government (*k*); and the right of the *mayor* of a borough and of a *town councillor* to exemption from this office would seem to follow from the same reason.

Clergymen, whose time and thoughts are supposed to be wholly occupied by the discharge of their sacred functions (*l*).

Roman Catholic clergymen, duly qualified according to law, and not being engaged in any trade or business for a livelihood, except that of a school master (*m*).

Attorneys-at-law, on account of their attendance in the courts of justice (*n*), and other *officers* of Her Majesty's superior courts at Westminster, for a similar reason (*n*). This privilege, however, seems not to extend to the holders of such offices of the courts as may be exercised by deputy (*o*).

Practising physicians, in the city of London and its suburbs, because of their obligation to attend the sick (*p*),

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(*g*) Gibs. 215.
(*h*) *Stephenson* v. *Langston*, 1 Hag. Con. 380.
(*i*) *R.* v. *Gayor*, 1 Bur. 245; 1 Lord Raym. 492.
(*k*) *Abdey's case*, Cro. Car. 585; 6 Mad. 140.
(*l*) 1 Vent. 105; 2 Str. 1107.
(*m*) 31 Geo. 3, c. 32, s. 8; 52 Geo. 3, c. 155, s. 9.
(*n*) Mod. 22; 2 Keb. 447; 1 Roll. Rep. 368. *Prouse's case*, Cro. Car. 389. *Ex parte Jefferies*, 6 Bing. 195.
(*o*) Marsh, 30.
(*p*) 5 Hen. 8, c. 6; 32 Hen. 8, c. 40.

and apparently also for the same reason all *practising physicians*, elsewhere in England.

Members of the College of Surgeons, in London (*a*), and *practising apothecaries* all England over for the same reason (*b*).

Every person who shall be registered under the provisions of the "Act to regulate the Qualifications of Practitioners in Medicine and Surgery, called 'the Medical Act'" (*c*).

A *captain* in the *Queen's Guards*, on account of his attendance on Her Majesty's person (*d*), and, as it seems, all other *officers* in the army, navy, and marines, though upon half-pay (*e*).

Sergeants, *corporals*, *drummers*, and *privates*, serving in the militia (*f*).

Registrars of births and deaths, and *registrars* of marriages (*g*).

Commissioners, *assistant-commissioners*, and *officers of excise*, and persons employed in the collection or management of, or accounting for the revenue of excise, whilst in actual service (*h*).

(*a*) 18 Geo. 2, c. 15.

(*b*) 6 Will. 3, c. 4; 30 & 31 Vict. c. 59.

(*c*) 21 & 22 Vict. c. 90. For the list of qualifications entitling a person to be registered under this Act, see sect. 18, and schedule A.

(*d*) 1 Lev. 233.

(*e*) *R.* v. *Gayor*, 1 Bur. 245; 1 Lord Ken. 492, S. C.

(*f*) 42 Geo. 3, c. 90, s. 174.

(*g*) 1 Vict. c. 22, s. 18.

(*h*) 7 & 8 Geo. 4, c. 53, s. 11. There are now in strictness no such officers as commissioners of excise, for by 12 & 13 Vict. c. 1, s. 1, after reciting that by Her Majesty's letters patent the same persons had been appointed commissioners of excise and taxes, such commissioners are constituted one consolidated board, to be called "The commissioners of inland revenue." But there can be no doubt that such last-named commissioners, and their

Commissioners, assistant-commissioners, or *officers of customs,* or persons employed in the collection or management of, or accounting for the revenue of customs, and their *clerks,* or persons acting under them, while acting or employed as such (*i*).

Her Majesty's *postmaster-general,* and, as it is apprehended, all deputies, officers, and servants by him appointed (*k*).

Persons actually serving at the time the office *of churchwarden,* or as it seems, *any other parochial office in another parish* (*l*).

And generally all persons holding any public office which requires a constant and personal attendance, are exempt from serving all parish offices, where the duties require personal attendance, and are not of a purely ministerial kind, and such as can be performed by deputy (*m*).

Also all *preachers* and *teachers* of *dissenting congregations,* provided they have duly qualified themselves according to law (*n*).

All other Protestant dissenters, who scruple to take upon themselves the office in person, may execute it by deputy

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assistants, officers, and deputies, in actual service, are exempt from serving the office of churchwarden.

(*i*) 8 & 9 Vict. c. 85, s. 12.

(*k*) *Ex parte Atkinson,* 10 Bing. 399; 4 M. & Scott, 160; 2 Dow. 773. The point decided was, that a clerk in the post-office is exempt from serving on a jury, by virtue of the letters patent appointing the postmaster-general, and of 6 Geo. 4. c. 60. The former professes to exempt the postmaster-general, and all deputies, officers, and servants by him appointed, from bearing any public office or employment, either ecclesiastical, civil or military.

(*l*) *Gilchrist* v. *Bracebridge,* Consistory Court of London, A.D. 1756, *Stephenson* v. *Langston,* 1 Hag. Con. 380 (n).

(*m*) Marsh, 30; Esp. N. P. 359.

(*n*) 1 Will. 3, sess. 1, c. 18; 52 Geo. 3, c. 155, s. 99.

to be approved of by the parishioners in vestry (*a*) ; and *Roman Catholic dissenters*, who scruple to act in person, may also serve by deputy to be approved by the parishioners in like manner (*b*).

Notwithstanding this indulgence, it seems that the ecclesiastical courts will not compel a dissenter to serve the office of churchwarden at all, either in person or by deputy, where the tenets, doctrines, and habits of his sect are recognized to be such as make it impossible for the courts to consider that he can conscientiously discharge the duties of churchwarden (*c*).

Upon this principle, in the case of *Adey* v. *Theobald* (*c*), Dr. *Phillimore* refused to compel a *Quaker* to take upon him the office of churchwarden, there being various duties of the office of churchwarden which a Quaker could not perform. It was at the same time expressly stated by the learned judge, in delivering his judgment in that case, that he must not be understood to say, that all dissenters are exempted, or to specify whether any, and if any, what class may be exempted. If that question came before the court, it it would then be time to distinguish between the cases, according to circumstances and facts. The court would not allow any assumption of a religious cloak to prevent persons from discharging legal obligations. But the Society of Friends were known ; they were a marked and peculiar caste ; were privileged, even as to their exemption from the form of marriage enjoined by the legislature. Their tenets, doctrines, and habits were recognized to be such as made it impossible to consider that they could discharge the duties of church-

(*a*) 1 Will. 3, sess. 1, c. 13, s. 7.
(*b*) 31 Geo. 3, c. 32, s. 7.
(*c*) *Adey* v. *Theobald*, 1 Cur. 447.

wardens. Having the means of knowing the conscientious scruples of this sect, a judge of an ecclesiastical court ought seriously to pause, not only before he attempted to violate the religious scruples of this class of persons, but also for the purpose of asking himself, whether he could conscientiously admit into the bosom of our Church persons who are disqualified from obeying her sanctions, or giving full force and effect to her institutions and ordinances (*d*).

Formerly, also, every person who had prosecuted a felon to conviction, and the first assignee of the certificate thereof, were exempt from serving the office of churchwarden in the parish where the offence was committed See 10 & 11 Will. 3, c. 28, s. 2. But this enactment was repealed by 7 Geo. 4, c. 84.

Bodily infirmity, unless perhaps it be such as positively to disqualify the party from performing the duties of the office, does not exempt him from serving ; and therefore in *Cooper* v. *Allnutt* (*e*), where the defendant prayed to be excused on account of deafness, his claim was disallowed, and he was directed by the spiritual court to take the oath of office before the property ordinary.

And *poverty* seems to furnish no *legal* excuse, for the parishioners may choose and trust whom they think fit (*f*).

As to the appointment, &c., of churchwardens of *donatives*, see *post*, s. 3.

In parishes which are divided by custom into separate townships or tithings, each choosing its own church-

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(*d*) See some further valuable observations of the learned judge in this case, as to the inexpediency of the vestry appointing *dissenters* churchwardens.

(*e*) 3 Phil. 165.

(*f*) *R.* v. *Martin Rice*, Lord Raym. 138 ; S. C. nom. *Morgan v. The Archdeacon of Cardigan*, 1 Salk. 166.

wardens (*a*), the parties chosen must, in like manner, be inhabitants of the respective townships or tithings.

The churchwardens of a chapelry, which has been constituted a separate and distinct parish under 1 & 2 Will. 4. c. 38 (*b*), must be fit and proper persons, chosen out of the inhabitants of such separate and distinct parish, and members of the Established Church (*c*).

The churchwardens of new parishes, under 6 & 7 Vict. c. 37 (*d*), are to be fit and proper persons, being members of the united Church of England and Ireland ; but there is no express enactment that they shall be chosen out of the inhabitants of such new parishes.

The churchwardens for the churches of district chapelries and consolidated chapelries, are to be fit persons residing within such district chapelries and consolidated chapelries (*e*).

The churchwardens of the churches of district chapelries and consolidated chapelries, under the Church Building Acts, are to be fit persons residing within such district chapelries and consolidated chapelries (*e*) ; but the statute which provides for the appointment of these officers does not require them to be members of the Established Church (*e*).

The only express requisite for churchwardens in all other cases under the Church Building Acts, is that they be "fit and proper persons" (*f*).

Churchwardens of separate parishes for ecclesiastical

(*a*) See *post*, p. 22.
(*b*) See sect. 33.
(*c*) See sect. 25, *post*, pp. 28, 29.
(*d*) Sect. 17 *vide post*, p. 29.
(*e*) 8 & 9 Vict. c. 70, s. 6.
(*f*) See 58 Geo. 3, c. 45, s. 73 ; 1 & 2 Will. 4, c. 28, s. 16 ; 8 & 9 Vict. c. 70, s. 7, *post*, pp.

matters of, district parishes, and of new parishes under 6 & 7 Vict. c. 37, must, however, it is apprehended, be inhabitants, that is to say, resident or at least occupying (*g*) householders of such separate parishes, district parishes and new parishes respectively, although there are no express enactments requiring this. For looking at the nature and character of their duties, persons not being inhabitants could scarcely be considered "fit and proper" persons to discharge them within the meaning of the statutes; and it seems to be most consonant with the principles of the common law, that the officers of a given district, if they have any concern with the taxation of the inhabitants should themselves be inhabitants, and also that the same general rules which regulate the election of parochial churchwardens, should, so far as they are consistent with the language of the legislature, be applicable to the election of these churchwardens, who are, as regards ecclesiastical matters, *substantially* parochial officers.

But the same reasoning does not (*h*) apply to the election of churchwardens of churches of district chapelries and consolidated chapelries; and the fair construction of the statute which provides for the appointment of these officers appears to be, that it is sufficient if they be resident within such districts, and that it is not necessary for them to be householders there (*i*).

Nor does the same reasoning apply to the cases of churches without districts, or of subscription churches and chapels under the Church Building Acts (*k*), and the

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(*g*) *Ante*, pp. 6, 8.

(*h*) Or certainly did not at the times of the passing of the Acts in question. But see the 8th section of "the Compulsory Church Rate Abolition Act, 1868."

(*i*) 8 & 9 Vict. c. 70, s. 6.

(*k*) *Id.* sect. 7; 5 Geo. 4, c. 103; 1 & 2 Will. 4, c. 38; 1 & 2 Vict. c. 107.

wardens of these churches need not, as it would seem, be householders at all (*a*), and it certainly is not necessary for them to be resident within the parishes or districts in which such churches are locally situated, nor is it absolutely necessary that they should be chosen from among the owners or renters of pews and sittings ; though in ordinary cases it is, *morally speaking*, most fit and proper that this should be done, for the fact of their being such owners or renters furnishes the best, if not the only satisfactory earnest of their intention regularly to attend divine service at such churches or chapels.

The observations in this section, so far as they relate to the common law office of churchwarden, are equally applicable to the office of *sidesman*.

SECTION III.

On the Appointment and Admission of Churchwardens.

The general rules which govern the election of churchwardens are the 89th and 90th *canons* of 1603, by which it is provided that churchwardens shall be chosen by the joint consent of the minister and parishioners, if it may be ; but if they cannot agree upon such a choice, then the minister is to choose one, and the parishioners another, and without such a joint and several consent none are to take upon themselves the office of churchwarden, neither are

(*a*) In a previous edition of this work (see 3rd edition, p. 14), the author expressed an opinion that churchwardens under the Church Building Acts must in all cases be householders ; but further reflection and the consideration of the language used in the 6th and 7th sections of 8 & 9 Vict. c. 70, have led him to entertain considerable doubt as to the correctness of this view. As to the necessity of a churchwarden at common law being a householder, see *ante*, p. 6, *et seq.*

they to continue any longer than one year in that office, except, perhaps, they be chosen again in like manner (*b*); and such choice is to be yearly made in *Easter* week (*c*).

The 89th canon, which is in affirmance of the common law, regulates the choice of the churchwardens in all cases where no custom to the contrary can be shown; and the choice is to be made by the minister and parishioners in vestry assembled (*d*). But where the inhabitants dispute the right of the minister to appoint one of the churchwardens in the event of the minister and the churchwardens not agreeing to appoint the same persons, it is unnecessary for him to go through the form of proposing his churchwarden to the parishioners for their approval (*d*); and in practice, though, perhaps, not in accordance with the original intention, the minister generally nominates one and the parishioners the other" (*e*).

A perpetual curate, being the spiritual incumbent of the parish, is a minister within the meaning of this canon (*f*), and in *Hubbard* v. *Penrice* (*g*) it is said that for this purpose a curate may stand in place of the minister.

But the canons of 1603 never having been confirmed by parliament, but only by the king in council, do not bind the laity *proprio vigore*, by their own force and authority, but only so far as they are declaratory of the ancient usage and law of the *Church of England* (*h*).

(*b*) Can. 89.

(*c*) Can. 90. The provision that the churchwardens shall be chosen in Easter week, is, however directory only—an election at any other time is valid in law: *Butt* v. *Fellowes*, 3 Curt. 68; *R.* v. *Inhabitants of St. Faith*, 25 L. J. Q. B. 168.

(*d*) *R.* v. *Allen*, 8 L. R. Q. B. 69.

(*e*) Eccl. Law Rep. 44.

(*f*) 8 L. R. Q. B. 69.

(*g*) 2 Str. 1246, and see *Grove* and *Elliott's case*, 2 Vent. 41.

(*h*) *Middleton and Wife* v. *Crofts*, 2 Atks. 650; *Lloyd and Owen* v. *Williams*, 1 Lee, 434. See further as to the authority of

They cannot therefore prevail, where they are contrary to the common law, nor where there is a custom at variance with them ; in which case such custom shall continue notwithstanding the canons ; but nothing is to be accounted a custom or prescription so as to supersede the common law of the land, except such custom or prescription as is beyond the memory of man, and nothing is accounted to be so by the law of this land, which can by any sufficient evidence be proved to have been otherwise, since the first year of of King Richard I. A. D. 1189 (*a*). It lies upon the party alleging the custom to establish its existence by satisfactory evidence (*b*), and the common law and the canons, so far as they are declaratory of the common law, or not inconsistent with them, shall prevail, unless controlled by such special

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these canons, and the extent to which they bind the clergy, the observations of Lord Hardwicke, in *Moore* v. *Moore*, 2 Atk. 157, and those of Lord Eldon in *Priestly* v. *Lamb*, 6 Vesey, 421. In a recent case in the Court of Arches (*Cooper* v. *Dodd*, 7 N. E. C. 514), the defendant, who was a clergyman, insisted that the 68th canon of 1603 was null and void, but *Sir Herbert Jenner Fust* held it binding upon the clergy. But he said that the canons of 1640, on which the defendant laid great stress, had never been received as part of the law of the Church. And see *Westerton* v. *Liddell*, *Beal* v. *Liddell*, 4 W. R. 167, where Dr. *Lushington* speaking of the 82nd canon, with reference to the covering of the Lord's table, says, "a canon in these matters being all powerful, except to repeal or alter an Act of parliament:" see W. R., p. 178: and see *Marshall* v. *The Bishop of Exeter*, 7 C. B. (N. S.) 658; and the opinions of the judges in this case in error in the House of Lords (delivered 5th August, 1867), in which it is said that the canons are prescriptions to the clergy, and are binding upon them in all matters which are within the scope of the visitorial power of the Crown as Head of the Church ; and see Stillingfleet's Ecclesiastical Cases, vol. 1, p. 259; 25 Hen. 8, c. 19; *Grove* v. *Dr. Elliott*, Chancellor of Sarum, 2 Vent. 42 ; Sir F. Moore, 755 ; *Bird* v. *Smith*, *ib.* 781, see p. 783.

(*a*) Prid. 57 ; *Hubbard* v. *Penrice*, 2 Str. 1246. As to the limitation of the time of custom or prescription in certain cases, see 2 & 3 Will. 4, c. 71.

(*b*) *Hubbard* v. *Penrice*, 2 Str. 1246; *Wilson* v. *M'Math*, 3 Phill. 67.

custom ; and if the custom be disputed, it is to be decided, like all other customs of the realm, by the courts of *common law*, and not by the *spiritual court* (*c*).

And, therefore, although it is impliedly provided by the canons, in accordance with the common law, that there shall be *two* churchwardens in a parish, there are many parishes where a custom is alleged to have but one, and such custom appears to have been recognized both by the temporal and by the ecclesiastical courts(*d*).

But it seems that a custom that there shall be no churchwarden in a parish is bad ; and this is clearly so, unless it can be shown that some other person has been immemorially bound to discharge all the necessary duties appertaining to the office ; and, therefore, in *R.* v. *Wix* (*e*), the Court of *King's Bench* held, that a return to a *mandamus*, stating an *immemorial custom* in the parish to have no churchwardens, and that the duties appertaining by law to the office of churchwardens had been from time out of mind discharged by the overseers of the poor, was bad, inasmuch as overseers had not existed time out of mind, and as there were necessary duties appertaining to churchwardens, there must have been some person bound by law to discharge those duties. And in *The Governors of St. Thomas's Hospital, acting by Leeson, their Syndick* v. *Treherne and Cove*(*f*), Sir *George Lee* held, that inasmuch as churchwardens are

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(*c*) Cro. Car. 552 ; 6 Mod. 89 ; 2 Lord Raym. 1008 ; 3 Salk. 1 ; 1 Bac. Abr. 371 ; *Dean of Exeter's case*, 1 Salk. 334 ; *Fruen* v. *Dean of York*, 2 Keb. 778 ; *Evelin's case*, 2 Cro. 551 ; *Vanacre* v. *Spleen*, Corth, 33.

(*d*) *R.* v. *Hinckley*, 12 East, 361 ; *R.* v. *Earl Shilton*, 1 B. & A. 275 ; *R.* v. *Catesby*, 2 B. & C. 814 ; *Woodcock* v. *Gibson*, 4 B. & C. 462 ; *Butt* v. *Fellowes*, 3 Curt. 880 ; *Gaudern* v. *Silby*. See Johnson's *Braintree case*, p. 89.

(*e*) 2 B. & Ad. 197.

(*f*) Lee, 127.

parochial officers for several purposes, and are to inspect the morals and behaviour of parishioners, as well as to take care of the goods and repairs of the church, they were necessary parish officers, whether they had anything to do with the parish church or not.

So in *R.* v. *The Inhabitants of St. Faith* (*a*), the Court of *Queen's Bench*, in Michaelmas term, 1851, made absolute a rule for a *mandamus* to elect churchwardens, although there had been no church in the parish since the 15th or 16th century (*b*); and although no churchwardens had been elected since 1690, and the rectory had been annexed to the hospital of St. Cross, and the inhabitants attended divine service, and buried and baptized, and until recently, had married there, Lord *Campbell* observing that churchwardens had both civil and ecclesiastical duties to perform, and that if the defendants had any answer they must state it in their return.

In the subsequent case of *The Attorney-General* v. *The Master and Brethren of the Hospital of St. Cross, ex parte Holloway* (*c*), before the Lords Justices, assisted by Mr. Justice *Wightman*, and Mr. Justice *Erle*, the title of the Rev. *H. Holloway* to the office of churchwarden of the parish of St. *Faith* was expressly recognized and upheld.

On the other hand, many large parishes are divided into several districts, townships, or tithings, where by ancient custom many churchwardens or chapelwardens are

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(*a*) MS., and see an anonymous case in Bernadiston, where a *mandamus* went to the inhabitants of an extra-parochial place to elect churchwardens and overseers of the poor.

(*b*) There was, however, a churchyard where the parish church had formerly stood, which had been used by the inhabitants for the burial of their dead, and was still called the churchyard of St. Faith. See 25 L. J. Ch. 206, 210.

(*c*) 25 L. J. Ch. 202.

elected (*d*), each of whom, though separately chosen by, and acting specifically for, the respective district, township, or tithing (*d*), represents, as it seems, the whole parish (*e*).

These cases are numerous in the *north of England* (*f*).

Again, where there hath been an immemorial custom for the parishioners to choose both the churchwardens, there the custom shall take place of the canon, and they shall continue to choose both the churchwardens still (*g*); and, accordingly, by virtue of this custom, most, if not all of the old parishes of London, that is, of the parishes established before time of legal memory, do there choose both their churchwardens (*h*).

But although the parishes in London for the most part choose both the churchwardens by custom, yet in all the newly-erected parishes the canon shall take place, unless the Act of Parliament, in virtue of which the church was erected, has specially provided that the parishioners shall choose both, inasmuch as no custom can be pleaded in such new parishes (*i*).

(*d*) Eccl. L. R. 48; *R.* v. *Marsh,* 6 N. & P. 687; 5 A. & E. 468; *Bremner and others* v. *Hull,* 35 L. J. (N. S.) Q. B. 332; 1 L. R. C. P. 748; *R.* v. *Archdeacon of Coventry,* Q. B. M. T. 1844, MS. In that case a *mandamus* issued to admit two gentlemen, who had been elected churchwardens for the township of *Thurlaston,* part of the parish of *Dunchurch,* in the county of *Warwick.*

(*e*) *R.* v. *Marsh,* 6 N & P. 668; 5 A. & E. 468, S. C.; and see *Bremner and others* v. *Hull,* 35 L. J. (N. S.) Q. B. 332; 1 L. R. C. P. 748.

(*f*) Eccl. L. R. 48.

(*g*) *Wheeley* v. *Lambert,* 3 Keb. 542; *Evelin's case,* Cro. Car. 397; *Butt's case,* Noy, 31; *Anon.* Noy, 139; *Shirley* v. *Brown,* 2 Roll. Abr. Prohibition, F. p. 287, pl. 51; Eccl. Law Rep. 44.

(*h*) Prid. 57; and see *Shirley* v. *Brown,* Roll. Abr. Prohibition, F., S. C. 51; *Evelin's case,* Cro. Car. 397; *Anon.* Noy, 139; 1 Lord Raym. 138.

(*i*) Gibson's Codex, 215.

In like manner, where there is a custom that the election shall be by a select vestry, and not by the whole parish (*a*).

Or by the lord of the manor (*b*).

Or by the old churchwardens (*c*).

The parish of Prestwich, in the county of Lancaster, consisted of six townships. By custom the churchwardens were chosen as follows :—in one township the outgoing churchwardens presented two names to the rector to choose from, one of whom might be himself—in the remaining five respectively the inhabitants of the respective townships presented two names to the rector to choose from—and the six persons chosen by the rector became the churchwardens of the parish. It was held that this was a good custom, that the separation of one township from the parish did not affect the custom in the remaining five, and that the five persons chosen thereunder were lawfully churchwardens of the parish (*d*).

So, where there is a custom to elect but *one new* churchwarden yearly, the junior churchwarden of the year before

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(*a*) Com. Dig. Esglise, F. 1 ; *Dawson* v. *Fowler*, Hardr. 378 ; *Golding* v. *Fenn*, 7 B. & C. 765 ; *Gibbs and another* v. *Flight and another*, 3 C. B. 581 ; 16 L. J. M. C. 13.

(*b*) 1 Burn's Eccl. Law, tit. "Churchwardens;" God. 153 ; Eccl. Law Rep. 45.

(*c*) *Catten* v. *Barwick*, 1 Str. 145.

(*d*) *Bremner and others* v. *Hull*, 1 L. R. C. P. 748 ; 35 L. J. C. P. 332. It may be mentioned that, in this case, the statements of a deceased rector as to the custom were received in evidence. See the report of the case in the Law Reports. In the parish of St. Cuthbert, Wells, Somersetshire, which for all secular purposes is divided into two separate parishes, the in-parish and the out-parish, the churchwarden of the in-parish is chosen by the municipal corporation of the borough out of their own body, and the churchwarden of the out-parish by the inhabitants of the out-parish. And the churchwardens of the parish of Bodmin are chosen, one by the vicar, the other by the mayor of the borough which is within the parish, but not co-extensive with it.

being continued of course as senior churchwarden (*e*); but in this case, in contemplation of law, the junior churchwarden of the preceding year is re-elected, and must be re-admitted with the new churchwarden (*f*).

Yet when the custom from any particular circumstance cannot be observed, it is held that the election must be made according to the rule of the canon; thus, where there was a custom that the parson should appoint one, and the churchwardens for the time being the other, and the two churchwardens could not agree, it was adjudged by the *Court of Delegates* that they must then resort to the canon (*g*), which ordains that churchwardens are to be chosen by the parson and parishioners jointly, and if they cannot agree, the one by the parson and the other by the parishioners (*h*).

And if the parson or vicar, who has by custom a right to choose one churchwarden, be under sentence of deprivation, the right of choosing both reverts to the parishioners (*i*).

But the right of appointing does not revert to the parishioners where the minister, being still competent to appoint, refuses to do so. In such case the right and duty of appointing still remain in the minister, and he may be compelled to appoint by *mandamus* (*k*).

In all these cases the custom relied upon must, of course, be clearly established, and proved to have been uniform and

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(*e*) *Butt's case*, Noy, 31; *Warner's case*, Croke, Jac. 532; *Stoughton* v. *Reynolds*, Str. 1045; *Gibbs and another* v. *Flight and another*, 3 C. B. 581; 16 L. J. M. C. 73.

(*f*) *Stoughton* v. *Reynolds*, Str. 1045; *Ellis* v. *Griffin*, 2 Curt. 673.

(*g*) Can. 89.

(*h*) *Catten* v. *Barwick*, 1 Str. 145.

(*i*) *The Churchwarden's of Northampton's case.* Carth. 118.

(*k*) In re *Barlow*, 30 L. J. Q. B. 271.

uninterrupted ; but where the alleged custom was that the parishioners appointed both churchwardens, and the general evidence in the case supported this view, but it was shown that in one instance a newly-appointed incumbent had appointed a churchwarden, who was sworn, but had never acted, the duties of the office having been performed by two persons chosen by the parish, of whom only one was proved to have been sworn in, it was held by the Court of *Queen's Bench* that this rather confirmed than weakened the evidence of the custom, because on that occasion the clergyman attempted to appoint, and actually got his nominee admitted, and yet the person so appointed did not venture to act, whilst the churchwarden appointed by the parishioners did (*a*).

Anciently at *common law*, the right to elect was exercised by the minister and parishioners paying *church rate* or *scot and lot*, in vestry assembled (*b*), each parishioner being entitled to one vote ; but the proceedings at parish vestries are now regulated, and somewhat modified, by certain Acts of parliament, which will be more particularly noticed in a subsequent part of this work (*c*).

In many parishes, however, the election is by custom made by *select vestries*, which seem to have grown from the practice of choosing a certain number of persons yearly to manage the concerns of the parish for that year, which by degrees came to be a fixed method ; and the parish lost not only their right to concur in the public management as often as they would attend, but also (in most places, if not all) the right of electing the managers. And such a custom

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(*a*) *R.* v. *Corfe*, Q. B. Easter Term, 1848, M.S.

(*b*) 1 Nolan, P. L. 41, 4th ed. ; Shaw's Par. Law L. C. 17. As to the summoning of the vestry and the proceedings thereat, &c., see *post*, c. 2, s. 2.

(*c*) See 58 Geo. 3, c. 69 ; 59 Geo. 3, c. 85 ; 32 & 33 Vict. c. 41, *post*, c. 2, s. 2

of the government of the parish by a select number hath been adjudged a good custom, in that the churchwardens accounting to them was adjudged a good custom (*d*).

In other parishes, the election is in a *select vestry* by *statute*, and this, in some cases, by virtue of specific Acts of parliament, applicable to particular parishes ; in others under 1 & 2 Will. 4, c. 60 (commonly called Sir *John Hobhouse's* Act), at least in cases where the right was in a *select vestry* previously to the adoption of this Act by the parishioners ; but whether this be so, where the right was previously in the *ratepayers at large*, has not been decided (*e*).

And, lastly in the various Church Building Acts provision is made for the election of churchwardens, one by the minister, and the other by certain persons specifically pointed out, in vestry assembled, according to the provisions of the respective Acts (*f*).

Thus, by 58 Geo. 3, c. 45, s. 73 (*An Act for Building or promoting the Building of additional Churches in Populous Parishes*), it is enacted, that "two fit and proper persons shall be appointed to act as churchwardens, for every church or chapel built or appropriated under the provisions of this Act, at the usual period of appointing parish officers in every year, and shall be chosen, one by the incumbent of the church or chapel for the time being, and the other by the inhabitant householders entitled to vote in the election of churchwardens, residing in the district to which the church or chapel shall belong; and if

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(*d*) Gibs. 139 ; Burn's Eccl. L. vol. 4, p. 10, tit. "Vestry."

(*e*) See *R.* v. *St. James's, Westminster*, 5 A. & E. 391 ; and see 1 & 2 Will. 4, c. 60, *post*, App. See further as to vestries, *post*, c. 2. See also as to this Act, *Hall* v. *Maule*, 7 A. & E. 721.

(*f*) In one instance the appointment of both churchwardens is vested in the minister. See 8 & 9 Vict. c. 70, s. 7, *post*, p. 32.

in any extra-parochial place, by such inhabitant householders as would be entitled to vote in the election of churchwardens, if such extra-parochial place had been a parish."

And by 59 Geo. 3, c. 134, s. 30, after reciting the above statute, it is enacted, "that in every district, parish, or division of any parish, or district chapelry, or consolidated chapelry, in which any church or chapel shall be built, acquired, or appropriated, under the provisions of the said recited Act (*a*), or this Act, in which there shall not be a distinct vestry belonging to such district or division, a *select vestry*, consisting of so many persons as shall be directed by the commissioners in that behalf, shall be appointed by the commissioners, with the advice of the bishop of the diocese, out of the substantial inhabitants of the district or division, or district chapelry, or consolidated chapelry, for the care and management of the concerns of the church or chapel, and of all matters and things relating thereto ; and such select vestry shall annually elect or appoint the churchwardens or chapelwardens to be named on the part of the parish or chapelry" (*b*).

By section 16 of 1 & 2 Will. 4, c. 38 (*the Act which empowers the building and endowing of churches by private individuals*), the churchwardens are to be chosen, one by the incumbent of the church or chapel for the time being, and the other by the renters of pews in such church or chapel ; but when any chapel of ease is separated from the mother church and endowed under section 33, two fit and proper persons are to be chosen yearly, at the usual time of choosing parish officers, out of such newly-constituted

(*a*) 58 Geo. 3, c. 45.

(*b*) Select vestries under the Church Building Acts have, however, been abolished by a recent Act of parliament. See 14 & 15 Vict. c. 97, s. 23 ; and see *post*, c. 2, s. 2.

parish, *being members of the Established Church*, to act as churchwardens of the said parish, one to be chosen by the minister, and one by the persons exercising the powers of vestry in the said new parish (*c*).

And again, by 6 & 7 Vict. c. 37. s. 17 (extended and applied by section 14 of 19 & 20 Vict. c. 104, to new parishes under that Act), it is enacted, that "in every case of a district becoming a new parish under that Act, two fit and proper persons, *being members of the United Church of England and Ireland*, shall, within twenty-one days from the consecration of the church thereof, be chosen churchwardens for such new parish, one being chosen by the perpetual curate thereof, and the other by the inhabitants residing therein, and having a similar qualification to that which would entitle inhabitants to vote at the election of churchwardens for the principal parish as aforesaid, or the majority of such inhabitants; and such election shall take place at a meeting to be summoned in such manner in all respects as such perpetual curate shall direct, and such persons shall continue such churchwardens until the next usual period for appointing parish officers following their appointment; and at the like time in every year two such persons shall thenceforward be chosen by the perpetual curate for the time being, and inhabitants assembled as aforesaid" (*d*).

(*c*) 1 & 2 Will. 4, c. 38, s. 25.

(*d*) That a district created under 1 & 2 Will. 4, c. 38, in which the incumbent is authorized to receive for his own benefit the fees of churchings and baptisms, and where the bishop has granted his license under 6 & 7 Will. 4, c. 85, which is revocable by him with consent of the archbishop under the 30th section of the last-named Act, for the publication of banns and the solemnization of marriages in the church thereof, and for the taking by the incumbent of the fees of such marriages, does not become a separate and distinct parish within section 14 of the 19 & 20 Vict. c. 104, so that the provisions of 6 & 7 Vict. c. 37, should apply to

So, by 8 & 9 Vict. c. 70, s. 6, it is enacted, "that, anything in the hereinbefore recited Acts to the contrary notwithstanding, in all cases not otherwise expressly provided for two fit persons shall be annually appointed churchwardens for the church of every district chapelry, or consolidated chapelry, already or hereafter to be formed under the provisions of the hereinbefore-recited Acts, or any of them, or this Act, such persons residing within the district chapelry, or consolidated chapelry, and that the first appointment of two such persons shall, with respect to the church of any district chapelry, or consolidated chapelry, already formed as aforesaid, take place within two calendar

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it. See *The Queen* v. *Perry*, 30 L. J. Q. B. 144. The Court, in giving judgment in that case, said they were of opinion that the authority contemplated and intended by the 14th section of 19 & 20 Vict. c. 104, was not a revocable license by the bishop, but an authority under an order of the commissioners under the 11th section of the Act, which would be of a permanent and irrevocable character. See further as to the operation of the 14th section of 19 & 20 Vict. c. 104, *Hughes* v. *Denton*, 5 C. B. (N. S.) 765; 28 L. J. M. C. 140; *Gough and Cartwright* v. *Jones*, 9 Jur. 82; 7 L. T. (N. S.) 566; *Jones*, app., *Gough and others*, resps., 11 Jur. (N. S.) 251; 12L. T. (N.S.) 31, in which case it was held that a consolidated chapelry may become a new parish, and that the words "such incumbent" in the 12th section of 19 & 20 Vict. c. 104, comprise within their meaning the incumbents of all the parishes out of which the consolidated chapelry had been formed—also that the relinquishment of the right of such incumbents to their dues need not be in writing. And see *Cronshaw* v. *The Wigan Burial Board*, 8 L. R. Q. B. 217, where it was held that a district chapelry under 59 Geo. 3. c. 134, s. 16, in which the incumbent was entitled to the surplice fees, had become a new parish under that section. See also *Fitzgerald* v. *Champneys*, 2 J. & H. 31, where it was held that the order in council for assigning a district under 59 Geo. 3, c. 134, and 2 & 3 Vict. c. 49, was void, as being inconsistent with the provisions of the *earlier local* Act, 56 Geo. 3, c. xxxix, and that for this reason the district had not become a new parish. That districts under the Church Building Acts may be assigned within the limits of an ancient parochial chapelry within a parish, and *semble*, that the entire chapelry may be divided into such districts, see *Tuckniss* v. *Alexander*, 1 Dr. & Smale, 614; 32 L. J. Ch. 794.

months after the passing of this Act, and with respect to a chapelry district or consolidated chapelry to be hereafter formed as aforesaid, within two calendar months after the formation of the same ; and that the first appointment of such person, in either of such cases, shall take place at a meeting of the minister of such church and of the householders of the district, to be summoned in all respects as such minister shall direct ; and that every subsequent appointment shall take place at the usual period of appointing parish officers at a meeting to be summoned in all respects as if such district were a parish and such meeting were a parish vestry meeting ; and that in each such case one of such persons shall be chosen by the then incumbent or minister serving such church, and the other by the householders, or the majority of such householders, residing in such district chapelry, or consolidated chapelry."

And by the 7th section of the same Act it is provided, anything in the hereinbefore-recited Acts to the contrary notwithstanding, " that, in all cases not otherwise provided for, two fit and proper persons shall be annually appointed churchwardens for any new church without a district, already built or hereafter to be built upon a site whereof Her Majesty's said commissioners shall have accepted the conveyance under the provisions of the hereinbefore-recited Acts ; and the first appointment of such persons shall take within two calendar months after the passing of this Act, with respect to a church already built and consecrated, and within two months after the consecration of a church to be so hereafter built ; and the next appointment of such person in either of such cases shall take place at the next usual period of appointing parish officers ; and in each such case, one of such persons shall be chosen by the minister of such church, and the other by the renters of pews therein, or by the majority thereof, at any meeting to

be summoned in all respects as the minister of such church, or (if there shall be no minister) as the churchwardens going out of office shall direct: provided always, that if there are no rented pews in such church, the minister of such church shall appoint both churchwardens; provided also, that if such new church is made the church of a distinct and separate parish, district parish, district chapelry, or consolidated chapelry, the several provisions of the hereinbefore-recited Acts or this Act, touching the appointment and election of churchwardens for the same, and their powers and duties in each such case, shall thenceforth respectively apply to such church."

By 58 Geo. 3, c. 45, s. 31, it is enacted, "that no divisions of any parish or extra-parochial place, whether it be divided into separate parishes with the consent of the patron and bishop of the diocese, or into district parishes, nor anything in this Act contained in relation thereto shall affect or in any manner be construed to affect any parish or extra-parochial place so divided, or the persons residing therein, in any other respect than in this Act particularly provided, or in any manner to apply to any poor or other parochial rates, which may be raised in the parish, or extra-parochial place so divided, or in any such separated parish, or district parish, or to the maintenance or relief of poor persons, or to any title or claim to such relief, or to any powers relating to such rates, or holding vestries, or appointment or powers of parish officers, or any such relief or claim thereto, or to any Act or Acts of parliament, or law or custom relating thereto, save and except as to church rates, in so far as the same are regulated by the provisions of this Act; but the original parish shall, for all such purposes, remain and continue in law a parish to all intents, as if no such division thereof into separate parishes or district parishes had been made."

It seems, therefore, that in order to give full validity to

the appointment of the churchwardens of the curtailed parish, considered as *temporal* officers, they should be chosen by the inhabitants of the whole original parish (*a*); but in a case where a parish had been divided into three separate and distinct parishes, and the churchwardens who had been appointed by the inhabitants of the curtailed parish only, sued as *ecclesiastical* officers for the recovery of church rates, Dr. *Lushington* held that they were good churchwardens for this purpose (*b*).

If the persons in whom the right of electing churchwardens is vested neglect or refuse to elect these officers, the ordinary has no jurisdiction, and cannot interfere to compel them to do so, nor can he, in such case, himself appoint the churchwardens; for the churchwardens are a corporation at *common law*, and therefore the proper way is to take a *mandamus* from the *Queen's Bench* to enforce their election by the proper parties (*c*): although it was formerly doubted, it is now clearly settled, that the Court of *Queen's Bench* will grant a *mandamus* for this purpose; and if a *primâ facie* case be shown of an improper election, the court will award a *mandamus* for a fresh election to give the parties impugning the election an opportunity of trying its validity upon the return to the *mandamus* (*d*).

And even where the office is *de facto* full by the party whose election is questioned having been admitted and

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(*a*) So ruled, and that the inhabitants of the whole parish have a right to vote at the election, in the recent case of *The Queen* v. *Stevens*, Clerk, *and another*, 32 L. J., Q. B. 90.

(*b*) *Varty* v. *Nunn*, 2 Curt. 877; 1 N. E. C. 191, S. C., confirmed, on appeal. *Nunn* v. *Varty*, 3 Curt. 352; 2 N. E. C. 108. See the observations of Dr. *Lushington*, in this case, as to the great obscurity of the Church Building Acts, and the extreme difficulty of interpreting them.

(*c*) *Stutter* v. *Freston*, Str. 52; *R.* v. *Wix*, 2 B. & Ad. 107, Eccl. L. R.

(*d*) *R.* v. *Rector of Birmingham*, 7 A. & E. 254.

taken the duties of the office upon him, the writ will go, there being no other convenient means for questioning the validity of the election, as *quo warranto* will not lie for usurping the office of churchwarden (*a*).

Thus, in the recent case of *R.* v. *Lewis*, clerk (*b*), where the Rector of Dolgelly, claiming the right by the custom of the parish to appoint both churchwardens, nominated *uno flatu* two gentlemen to the office, who were admitted by the ordinary, and persisted in his double nomination, the court, on affidavits negativing the custom, made absolute a rule for a *mandamus* to the reverend defendant to nominate and appoint one churchwarden (*c*).

But the court will not grant the rule for a *mandamus* where there has been an election *de facto*, unless it be shown that the result would probably have been different if the proceedings had been properly conducted, or that the proceedings were otherwise null and void (*d*).

In some parishes it has been usual, for many years, for the vestry to excuse a person who has been chosen to the office of churchwarden from serving that office, upon his paying a fine for the benefit of the parish (*e*).

Doubts seem at one time to have been entertained by the ecclesiastical courts, as to the legality, or at least as to the

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(*a*) In re *Barlow*, 30 L. J., Q. B. 271.

(*b*) Queen's Bench, Trinity Term, 1870. The author, who was one of the counsel engaged in the case, is not aware that there is any report of it.

(*c*) In the course of the discussion on the application for the rule *nisi* one of the learned judges, (*Mellor*, J.), expressed a doubt as to whether the custom would be good in *law*. The reverend defendant obeyed the writ without raising any issue either of law or of fact on the custom.

(*d*) *Ex parte Joyce*, 3 E. & B. 178; 23 L. J. M. C. 153.

(*e*) *Birnie* v. *Weller*, 3 Hagg. 474; *Adey* v. *Theobald*, 1 Curt. 447.

propriety, of this practice ; but whatever objections may apply to the practice of fining, which may be liable to abuse, it has been declared by Sir *John Nicholl* that the vestry has certainly the power to excuse a person once chosen. By mere election the office is not full ; for as soon as the election is notified to the person chosen, he may show that he is in such a state of health as to be unable to discharge the duties of the office ; or that he is going abroad, and that it would be more convenient to him and advantageous to the parish that he should serve another year. And there is no authority to the effect, that because a vestry first fixes upon one person, and subsequently sees some good and reasonable cause, such as ineligibility, poverty, or ill health, to excuse him, it may not rescind that election, and proceed to a new election ; and when the vestry has, even for a bad reason, excused the individual first fixed upon, a proper person, subsequently chosen at the same meeting, is duly elected and liable to serve (*f*). With reference to the practice of fining, the learned judge in the same case observed : "It is not necessary for the court to go to the length of deciding that the payment of a fine is a legal exemption. The practice might lead to many inconveniences, but the acceptance of the fine is discretionary with the vestry ; and if any inconvenience arises from the practice, it is in the power of the vestry to stop it. There may, however, be instances where the practice is beneficial, where the vestry may have selected a fit person, but on consideration and cause shown, may prefer accepting a fine for the advantage of the parish, and so exempt the person first elected ; such an exemption, however, cannot render a subsequent election of another person void."

(*f*) *Birnie* v. *Weller*, 3 Hagg. 474.

This practice of fining has subsequently been incidentally brought before the courts, as it is believed without censure (*a*) : and as it still continues very common, there is every ground for holding that it is both a legal, and, under proper regulations, a beneficial practice.

After the churchwardens had been duly elected, the first thing formerly required of them was to take the oath of office before the archdeacon or other proper ordinary, previously to their entering upon their official duties, which is usually in the first week after Easter.

The form of the oath was originally agreed upon between the civilians and common lawyers, and is as follows :—

You shall swear truly and faithfully to execute the office of churchwarden within your parish, and according to the best of your skill and knowledge, present such things and persons, as to your knowledge are presentable by the laws ecclesiastical of this realm. So help you God, and the contents of this book (*b*).

But now by 5 & 6 Will. 4, c. 62, s. 9, it is enacted, "that in future every person entering upon the office of churchwarden or sidesman, before beginning to discharge the duties thereof, shall in lieu of such oath of office make and subscribe in the presence of the ordinary, or other person before whom he would but for the passing of this Act be required to take such oath and declaration, that he will faithfully and diligently perform the duties of his office. And such ordinary and other person is hereby required to administer the same accordingly."

The regular and proper course is for the outgoing churchwardens to present their successors to the ordinary for admission ; but this is not necessary in point of law, as the

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(*a*) *Adey* v. *Theobald*, 1 Curt. 447.
(*b*) Gibs. Cod. 243.

ordinary will admit the new churchwardens if he be otherwise reasonably satisfied of their election (*c*).

The admission of the churchwardens by the ordinary ought undoubtedly to take place before they begin to discharge the duties of their office. This is required, not only by the ecclesiastical law (*d*), but also by statute (*e*), and is necessary to complete their legal title (*f*). Indeed, it is provided by the canon that the old churchwardens and the sidesmen shall continue in office until the new churchwardens are sworn (*g*), and in the recent case in the *Queen's Bench* of *Bray*, appellant, *Somer*, respondent (*g*), it was expressly decided that an outgoing churchwarden, whose year of office has expired, does continue in office until his successor is not only elected, but has also been admitted; whilst the previous common law authorities, when fairly examined, certainly seem, upon the whole, to support this position (*h*). It is moreover laid down by *Prideaux*, that, until they are sworn, churchwardens can do no legal act as *churchwardens*, nor can they have any authority, whatever

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(*c*) See *Anthony* v. *Seger*, 1 Hagg. Con. 10; *Story* v. *Colk and Preedy*, 6 N. E. C. Sup. 33.

(*d*) Can. 118.

(*e*) 5 & 6 Will. 4, c. 62, s. 9.

(*f*) Can. 118; 5 & 6 Will. 4, c. 62, s. 9; Prid. 62, 121.

(*g*) 2 B. & S. 374; 31 L. J. M. C. 135. In this case the outgoing churchwarden was held liable to the penalty for not signing the jury lists imposed by 6 Geo. 4, c. 50, although his year of office had expired, and his successor been elected before the time for signing the lists. It should be mentioned that his successor had not *in fact* performed any of the duties of the office.

(*h*) See *Foot* v. *Prowse*, 1 Str. 625; *R.* v. *Whitchurch*, 7 B. & C. 553; *R.* v. *Corfe Mullen*, 1 B. & Ad. 211; *R.* v. *Marsh*, 5 A. & E. 468; *Doe dem. Townsend* v. *Mace*, 7 Jur. 628; Vin. Ab. tit. "Churchwardens." A. 2. pp. 9, 13; *Stoughton* v. *Reynolds*, St. 1045; *The Attorney-General* v. *The Master and Brethren of St. Cross, ex parte Holloway*, 25 L. J. Ch. 202.

money they lay out on the church account, to make or levy any rate, or take any other method again to reimburse themselves; but whatever they do of this kind, while unsworn, is all to their own wrong, and if the parish refuseth to pay them, they can have no remedy in law to force them to it (*a*): at the same time it is apprehended that if they do act before admission, their acts will, for some purposes at least, be supported as the acts of officers *de facto*, though this can scarcely be considered as settled (*b*).

If a person duly elected refuse to take upon himself the office of churchwarden, he may be proceeded against in the *Ecclesiastical Courts*, and compelled to take the oath (*c*), or rather make the necessary declaration (*d*), before the proper officer, and if he still refuse he might formerly have been excommunicated (*e*). And he may now, by virtue of the 53 Geo. 3, c. 127, which abolishes excommunication except in certain specified cases, and substitutes the writ *de contumace capiendo*, in lieu of the writ *de excommunicato capiendo*, be declared contumacious, and taken under a writ *de contumace capiendo*. This latter writ issues out of *Chancery*, upon a *significavit* from the *Ecclesiastical Courts*, signifying to the Queen in *Chancery* that he has been pro-

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(*a*) Prid. 62.

(*b*) 1 Vent. 267; Noy, Rep. 139; *R.* v. *Whitchurch*, 7 B. & C. 573; *R.* v. *Marsh*, 5 A. & E. 468. See the observations of *Denman*, C. J., and of *Littledale*, J., in this case. See also *R.* v. *Inhabitants of St. Clements*, 12 A. & E. 177; S. C. nom; *R.* v. *Ipswich JJ.*, 3 P. & D. 481; *Butt* v. *Fellowes*, 3 Curt. 680; *Turner* v. *Baynes*, 2 H. B. 559. See also *Lorant and another* v. *Scadding*, in error, 13 Q. B. 706; affirmed in Dom. Proc. *Scadding* v. *Lorant*, 955; 15 Jur.; 3 H. of L. Cas., 418. And see *Bray*, app., *Somer*, resp., 2 B. & S. 376.

(*c*) *Cooper* v. *Allnutt*, 3 Phil. 165.

(*d*) 5 & 6 Will. 4, c. 62, s. 9.

(*e*) Gibs. Cod. 216, 243, 901.

nounced contumacious, and no prohibition lies to that court (*f*), nor will the temporal courts set aside the writ *de contumace capiendo*, or discharge him on *habeas corpus*.

If the old churchwarden be re-elected to the office for the ensuing year, he should be re-admitted by the ordinary, if he intends to serve (*g*). But re-admission is not necessary to give validity to the acts of the outgoing churchwarden between the expiration of his year of office and the admission of his successor (*h*). Nor is it necessary to entitle the re-elected churchwarden to sue, or to give validity to his other acts as churchwarden (*i*).

But if a person who has already filled the office should be chosen a second time without good reason or a precedent for so doing, he will not be compelled to serve (*i*). Where, however, there is a custom, as in the old parishes of the city of London, to re-elect the under-churchwarden to serve for the following year as upper-churchwarden, a person who has already filled the former office will not be excused from filling the latter in accordance with the custom (*i*).

If a party, having a privilege of exemption, be chosen, he may have his *writ of privilege* to the *Ecclesiastical Court* commanding them not to admit him, and if it be disobeyed, a *prohibition* lies (*k*).

(*f*) Gibs. Cod. 216.

(*g*) *Stoughton* v. *Reynolds*, 2 Str. 1045.

(*h*) *Bremner and others* v. *Hall*, 36 L. J., C. P. 332; 1 L. R. C. P. 748, S. C.

(*i*) *Edney and Lunn* v. *Smallbones*, 21 L. T. (N. S.) 506.

(*k*) See the opinion of the learned Dr. *Harris*, to this effect, in Burn's Eccl. Law, by Phil. vol. 1, p. 40, *a*.

(*l*) *Stampe's case*, Palmer 392; S. C. 2 Roll. Abr. 268; *Wilson's case*, 1 Roll. Abr. 368; *Barber's case*, *ib.*; *Prowse's case*, Cro. Car. 389; *Sir Walter Fane's case*, 1 Lev. 133; *Dr. Poordage's case*, 1 Mod. 22; *Stone's case*, 1 Vent. 16, 29; *Sanderson* v. *Harrison*, Palm. 392; *Pemberton's case*, Bail Court, E. T. 1845. In the last case the writ went to exempt an attorney from serving the office of overseer of the poor.

Or he may, upon citation into the *Ecclesiastical Court* to compel him to enter upon the office of churchwarden, appear and set forth his objections in an act on petition (*a*).

This office of archdeacon or other ordinary in admitting the churchwarden is ministerial only; for, the churchwarden being a *temporal* officer, the ordinary cannot exercise any judicial authority in the matter (*b*). He has no power to decide on the validity of the election, or even to inquire whether it be disputed or not, nor can he exercise any discretion as to fitness of the party chosen. If a colourable title is shown, he is bound to admit, whether the act be of validity or not; and if he refuses he may be compelled by *mandamus* (*c*).

Therefore, where to a *mandamus* to swear in churchwardens the ordinary returned that there were two causes depending before him, which had been afterwards consolidated into one, in which two sets of persons claimed to have been duly elected, and that he could not, consistently with his duty, and with the law and practice of the *Episcopal Court*, admit or swear the prosecutors, until it should have been judicially determined in the cause then depending before him that they were duly elected into such office, the Court held the return bad, as he had no power to try the right, and a peremptory *mandamus* issued (*d*).

And in a more recent case, in which a scrutiny of votes was pending between two sets of adverse parties, each

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(*a*) *Adey* v. *Theobald*, 1 Curt. 447.

(*b*) *R.* v. *Rice*, Lord Raym. 138; S. C. 1 Salk. 166; 5 Mod. 325; *R.* v. *Simpson*, Str. 609; *R.* v. *Dr. Ward*, Str. 893; *R.* v. *Dr. Harris*, 4 Burr. 1420.

(*c*) Of course if the party applying could have no claim, the Queen's Bench would not interfere. See *ex parte Penruddock*, 1 Har. & W. 347, *post*, p. 43.

(*d*) *R.* v. *Dr. Harris*, 3 Burr. 1420.

of whom claimed to have been duly elected, the Court directed the *mandamus* to go, and said that it was clear according to the old practice, that where there are two sets of parties who have each a colourable title to the office of churchwarden, both sets must be sworn in (*e*).

So where a return to a *mandamus* to swear in a churchwarden stated that he was a person unfit, being a poor dairyman, and the like, and the question was whether the archdeacon could refuse to swear and admit the churchwarden so elected for any cause whatsoever, it was resolved that he had no such power; for the churchwarden is a temporal officer; he hath the property and custody of the parish goods; and as it is at the peril of the parishioners, so they may choose and trust whom they may think fit, and the archdeacon hath no power to elect or control their election (*f*).

But this doctrine must not be taken to be correct in its largest sense, for offices the most ministerial leave a discretion not to join in an illegal act, and although it is the duty of the ordinary not to take slight exceptions, he is bound to take care that an election, in his opinion *void in itself*, shall have no legal effect; this is a duty which he owes to the parish, and to the general law of the country; and therefore if a parish return an *alien*, a *Papist*, or a *Jew*, the ordinary would be bound to reject him (*g*).

(*e*) *R.* v. *Archdeacon of Middlesex*, 3 A. & E. 615; 5 N. & M. 494. So in *R.* v. *The Rev. Joseph Corfe*, B. C., M. T. 1847, MS. the writ went, although the defendant had already admitted the adverse claimant. It should, however, be mentioned, that in this case no cause was shown against the rule for the *mandamus*.

(*f*) *R.* v. *Rice*, Lord Raym., 138; S. C. 1 Salk. 166; 5 Mod. 325.

(*g*) Per Sir *Wm. Scott*, in *Anthony* v. *Seger*, 1 Hagg. Con. 9. But as to its not being the duty of an ordinary to reject a *Roman Catholic*, *vide ante*, pp. 9, 10. The case of a *Popish recusant convict* would of course have stood upon different grounds. *Ante*, p. 10, note (*d*).

And although the ordinary cannot exercise any judicial authority, he may inquire whether the party has been *duly* elected, otherwise he would be bound to admit any person who presents himself for admission; and therefore where to a *mandamus* to admit A. B. to the office of churchwarden, the defendant returned that the party was not duly elected, the return was held good (*a*).

In such a case, the validity of the election can be tried in an action for a false return (*b*), or by traversing or otherwise pleading to the return (*b*).

Admission, however, does not confer any title upon the party admitted (*c*), and this being so, and the office of the ordinary being ministerial only, the Court has, it is believed in many instances, granted a *mandamus* to swear in *absolute* in the first instance (*d*); even where there may have been a dispute between adverse parties as to the right to

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(*a*) *R.* v. *Williams*, 8 B. & B. 681; S. C. 3 Man. & Ry. 402. And see *The King* v. *Harwood*, 2 Lord Raym., 1.

(*b*) *R.* v. *White*, Lord Raym., 1379; *R.* v. *Twitty*, 2 Salk. 433. See also the note of the learned reporters in *R.* v. *Archdeacon of Middlesex*, 5 N. & M. 494. And see *R.* v. *Freeman*, Clerk, 18 L. T. (N. S.) 88. In that case the defendant had returned that the prosecutor was not duly elected. It appeared that he had been duly elected, but that he had claimed exemption and refused the office. Another person had then been duly elected in his stead, who subsequently sent to the vestry his resignation on condition that the prosecutor would accept the office. The vestry thereupon confirmed the appointment of the prosecutor who *afterwards* accepted the office. It was held by *Bovill*, C. J., at the trial, and afterwards by the Court of *Queen's Bench*, that the proceedings of the vestry could not be sustained either as a confirmation, or as a fresh election (the office being full at the time), and that defendant was entitled to the verdict. The author, who was one of the counsel in the case, is not aware of any report of it in the Q. B.; the report in the "Law Times" is of the proceedings at *nisi prius*.

(*c*) *Anon.* 2 Chit. Rep. 254.

(*d*) *Id. Ex parte Winfield*, 3 A. & E. 614; *Ex parte Duffield*, 3 A. & E. 617. And see *ex parte Lowe*, 4 Dow. P. C. 15.

appoint, and each party may, *de facto*, have exercised that right (*e*).

But in the recent case of *R.* v. *Stevens, Chancellor of Bangor* (T. T. 1870), in which the author was one of the counsel engaged, the Court refused to grant the rule absolute in the first instance for a *mandamus* to admit the churchwarden chosen by the parish, stating that the learned Chancellor might have some cause to show against the rule; and they moreover directed that notice of the rule should be served on the rector, who claimed, and had *de facto* exercised, the right of appointing both churchwardens, and also on the persons appointed by him; and on the rector appearing to show cause against the rule, they permitted him to do so, although it was duly objected that he had no right to be heard.

It is possible therefore that for the future the Court will refuse to grant a rule for a *mandamus* to admit a churchwarden absolute in the first instance—and they certainly will not in the first instance grant a peremptory *mandamus* so as to preclude the ordinary from making a return (*f*).

It should be further remarked here, that the power of the ordinary to inquire into the validity of the election is not confined to the mere right of inquiry for the purpose of making a return to a *mandamus*; but that the parties may, if they think proper, submit the question to him for his judicial decision. This course was adopted in *Anthony* v. *Seger* (*g*), and also in the recent cases in the *Archdeaconry*

(*e*) *Ex parte Penruddock*, 1 Har. & W. 347. In this case, during the vacancy of a living, the sequestrator and the curate had both appointed. *Coleridge*, J., in giving judgment, is reported to have said, "It could not be expected that the court would interfere to compel the archdeacon to swear in a person who could have no claim whatever; that is not, however the case here," and the rule was absolute in the first instance.

(*f*) *R.* v. *Archdeacon of Coventry*, Q. B. M. T., 1844, MS.

(*g*) 1 Hag. Con. 9.

Court of London of *Story* v. *Colk and Preedy* (*a*), and *Westerton* v. *Davidson* (*b*). In his judgment in *Story* v. *Colk and Preedy* (*a*), Dr. *Robert Phillimore*, the official of the court, referred to an old case in that court on the election of a churchwarden, which was subsequently appealed to the *Court of Arches* and the *High Court of Delegates*, upon which judges of the common law must have sat, and who affirmed the sentence of the official.

Upon this subject it is observed by the *Ecclesiastical Commissioners*, that if the election be disputed great difficulties arise in trying its validity. The *Ecclesiastical Court* has no authority to determine the question, and the extent of discretion which it should exercise in swearing in, or declining to swear in, persons alleged to be chosen churchwardens, is difficult to be defined. The writ of *quo warranto* will not be granted, and the election can be tried only by an action at law (*c*).

The bishop has no jurisdiction over *donative* churches (*d*), and doubts have in some instances been entertained as to the power to appoint and swear in churchwardens for them (*e*); but these doubts seem not to apply to cases where donatives are *parish churches* (*f*), for although there

(*a*) 6 N. E. C., Sup. 33.

(*b*) 1 Eccl. & Ad. Rep. 385.

(*c*) Eccl. L. R. 45. And see *R.* v. *Shepherd*, 4 T. R. 381. *R.* v. *Daubeny*, 2 Str. 1196. In re *Barlow*, 30 L. J., Q. B. 271. That the validity of the election, may, however, be tried by *mandamus*, even where the office is *de facto* full, see the last-named case, and *ante*, pp. 33, 34, and that a prohibition may be obtained if the ordinary proceed to admit a person not duly elected, see *Roll. Abr.* tit. "Prohibition."

(*d*) This was so at the date of the Eccl. L. R.; but see the subsequent stat. 1 & 2 Vict. c. 106, s. 124, which gives the bishop jurisdiction over the incumbent for the purposes of that Act.

(*e*) Eccl. L. R. 24.

(*f*) That donatives may be parish churches, see Degge, 197, citing 2 Roll. R. 1; 1 Inst. 344, a; 6 H. 7, 14, a. Contra Keeble.

is a difference as to the *incumbent*, yet as to the *parish officers* there is none, for they are the officers of the parish, and not of the patron of the donative (*g*); but it has been questioned whether the ordinary had jurisdiction in such cases where the patron had appointed a *commissioner* as *visitor*, before whom the churchwardens might be sworn (*h*).

The ordinary is bound to admit the churchwarden immediately upon his applying to be admitted, notwithstanding a usage not to admit until the first visitation after *Easter* (*i*), and no fee is payable except by special custom (*k*).

For the better information of churchwardens as to those particulars which they are to present, it is usual for the ordinary to furnish them with articles extracted out of the laws of the Church, and founded for the most part on the book of canons made in 1603, and the rubrics of the *Common Prayer*, according to which they are to make their presentments (*l*).

They ought not to be continued in office more than one year, except, perhaps, they be chosen again in like manner (*m*), but this refers only to the period at which others should be appointed, for when once admitted, they continue in office until those who are chosen to succeed them are admitted (*n*). And although it has been said that it is

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(*g*) *Castle* v. *Richardson*, Str. 715; 1 Burn. B. R. 5, S. C. See also *The Governors of St. Thomas's Hospital* v. *Treherne and Cove*, 1 Lee, 126.

(*h*) See 1 Inst. 344; Tyrwhitt's Burn's Eccl. Law, tit. "Donative," vol. 2, p. 228.

(*i*) *R.* v. *Archdeacon of Middlesex*, 3 A. & E. 615; 5 N. & M. 494.

(*k*) *Goslin* v. *Ellison*, 1 Salk. 330.

(*l*) Prid. 2; Can. 119.

(*m*) Can. 89.

(*n*) Can. 118; *R.* v. *John Marsh*, 5 A. & E. 468.

improper that the old churchwardens should be continued (*a*), this may depend upon the discretion of the parish, and the court has no authority to interfere (*b*).

In some parishes, indeed, the practice is for the churchwardens to continue in office by tacit consent, if not actually re-elected, until they choose to retire, or are dismissed from the office (*c*). But this is undoubtedly a practice in ordinary cases "more honoured in the breach than the observance" (*d*).

If a churchwarden quits the parish where he is serving, his place should be supplied (*e*) ; but it seems that a churchwarden who, during the continuance of his office, ceases to reside in his parish, does not thereby *ipso facto* cease to be a churchwarden, although it is a good ground for appointing another in his place (*f*).

And a churchwarden who misbehaves himself in his office may be removed therefrom, and another chosen before the year expires (*g*).

The mode of removal seems to be by complaint to the bishop or other ordinary (*h*).

(*a*) Prid. 62.

(*b*) *Anthony* v. *Seger*, 1 Hagg. C. R. 9.

(*c*) See *Butt* v. *Fellowes*, 3 Curt. 368.

(*d*) *In Gibbs and another* v. *Flight and another* (in error), Scac. Cam. Mich. Vac. 1847, MS., *Alderson*, B., said, that the custom of having a man serve for two years was beneficial, as it secured the services of a man who knew his duty; but that to elect him in perpetuity would be very pernicious.—See this case in the court below, 3 C. B. 581; 16 L. J. M. C. 73. The case was ultimately referred to the order of Mr. Justice *Erle*. See also *ante*, pp. 24, 25.

(*e*) Per Sir *Wm. Wynne*, in *Stephenson* v. *Langston*, 1 Hagg. C. R. 379.

(*f*) *Ganvill* v. *Utting*, 9 Jur. 1081.

(*g*) Lamb. Off. Ch. sect. 3. And see *Bruges*, *Fry* and *Robert Greata* v. *Levi Treasure*, 2 Moore, P. C. (N. S.) 529; 11 Jur. (N. S.) 205, S. C.

(*h*) Com. Dig. tit. "Eglise" (F. 2.)

Sidesmen are chosen by the minister and parishioners, if they can agree, otherwise by the ordinary of the diocese; and such choice is to be yearly made in *Easter* week (*i*).

They are to continue in office until the new churchwardens are admitted, and are themselves admitted by the ordinary in like manner as the churchwardens (*k*).

The sidesman's oath, which was agreed upon at the same time as the churchwardens by the civilians and common lawyers, is as follows:—"You shall swear that you will be assistant to the churchwardens in the execution of their office, so far as by law you are bound. So help you God" (*l*).

But now a declaration is submitted in lieu of this oath (*m*).

Churchwardens and chapelwardens under the various Church Building Acts are to be admitted by the ordinary in the like manner as parochial churchwardens, and like them they are to continue in office but for one year, and fresh elections are to be annually made (*n*).

(*i*) Can. 90.
(*k*) Can. 118.
(*l*) Gibs. Cod. 216; Burn's Eccl. Law, tit. "Churchwardens."
(*m*) See 5 & 6 Will. 4, c. 62, s. 9. See *ante*, p. .
(*n*) See 58 Geo. 3, c. 45, s. 73; 1 & 2 Will. 4, c. 38, ss. 16, 25; 6 & 7 Vict. c. 37, s. 17; 8 & 9 Vict. c. 70, ss. 6, 7.

CHAPTER II.

ON THE DUTIES OF CHURCHWARDENS WITH REFERENCE TO THE UTENSILS, ETC., OF THE CHURCH AND THE REPAIRS OF THE CHURCH AND CHURCHYARD.

SECTION. I.

Of the Goods and Utensils of the Church which the Churchwardens ought to supply, and of the Repairs of the Church and Churchyard which it is their duty to superintend.

As soon as the churchwardens are admitted by the ordinary, they are in the full power of their office; and although the parish stands in several counties, their authority is the same in every part of it, as if it had stood in the same county. That it is otherwise as to constables, overseers of the poor, and other parish officers, is from the difference which is between the civil and ecclesiastical jurisdiction. For they being officers of the civil jurisdiction, must follow the divisions of that, which is into counties, hundreds, and tithings; and, therefore, where there are different tithings, different hundreds, and different counties, there must be different constables, and different overseers of the poor although in the same parish. But the churchwardens, being officers in ecclesiastical affairs, must follow the division of the ecclesiastical jurisdiction, which is into dioceses, archdeaconries, deaneries, and parishes; and, therefore, where there is the same parish, the same deanery, the same archdeaconry, and the same diocese, the same churchwardens must serve for the whole parish, and they have the same power of executing their office in every part of it, in

how many different counties or different hundreds soever it be, and must at the same visitation, whether of the bishop or archdeacon, or other ordinary, account for the discharge of it. And because the church is, that wherein all the members of it are united, of that deanery, and of that archdeaconry, and of that diocese must the whole parish be reputed to be in which the parish church stands (*a*).

The churchwardens are, as was before observed, the *guardians or keepers of the church*, and the *legal representatives of the parish body*, and for their benefit they are for some purposes described by the law as a kind of *corporation* (*b*). The *goods, chattels*, and *utensils* belonging to the church are vested in them for the use of the parishioners; and they have the care and management of them, and are so to order them as may be for the best advantage of the parishioners; and to this end they may purchase goods and church articles for their use and benefit, and may sue and be sued in respect of them as a corporation (*c*); and it is their duty to provide,

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(*a*) Prid. 121, 122.

(*b*) Cro. Jac. 234, and see *Liddell* v. *Beale*, 14 Moore, P, C., where on this ground the monition to remove certain furniture from the church of *St. Barnabas*, Pimlico, was directed "to the church or chapelwardens," without mentioning their name.

(*c*) *R.* v. *Martin Rice*, Lord Raym. 138; S. C. 1 Salk. 166; 5 Mod. 325; and see *Jackson* v. *Adams*, 2 Bing. N. C. 402, and the authorities there referred to. See also *Moss and others* v. *Thorniley and others*, 4 W. R. 514; 27 L. T. 101. In this case certain books of a chapelry district had been purchased out of the rates levied over the whole district, and passed from time to time from the churchwardens to their successors. After the purchase the district was contracted under the Church Building Acts, and also under an Act for dividing the parish in which the ancient chapelry was situate, and churchwardens appointed for the contracted district, who *de facto* succeeded the old churchwardens, though the area of the district was not so extensive. It was held that these books belonged to the churchwardens of the contracted district, and that they could recover them in detinue from the old churchwardens.

and from time to time to keep in good and sufficient order and repair, at the expense of the parish, all such things as may be necessary for the decent and orderly celebration of the various services of the church, and for the due administration of the holy sacraments (*a*).

Thus they are to take care that the church be provided with a convenient and decent table for the celebration of the Holy Communion (*b*); and that the same be from time to time kept and repaired in a sufficient and seemly manner; and that the same be covered in time of divine service, with a carpet of silk or other decent stuff, thought fit by the ordinary of the place (if any question be made of it (*b*), and with a fair linen cloth to spread thereon at the ministration of the Lord's Supper (*c*).

The communion table must be a table in the ordinary sense of the word made of wood, flat, movable, capable of being covered with a cloth, at which or round which the communicants might be placed in order to partake of the Lord's Supper (*d*). A stone altar is not a communion table within the meaning of the rubric and canon, and whether fixed to the freehold or not, cannot lawfully be substituted for a movable wooden table (*e*); nor is a table with a cross

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(*a*) Can. 85.

(*b*) Can. 82.

(*c*) Can. 82. Introductory rubric to the order for the administration of the Lord's Supper or Holy Communion.

(*d*) *Liddell* v. *Westerton*, P. C. 5 W. R. 470.

(*e*) *Faulkner* v. *Litchfield and Stearn*, 1 Roberts, 184; *Westerton* v. *Liddell*, 4 W. R. 167; *Liddell* v. *Westerton* (Arches), 5 W. R. 179; *Liddell* v. *Westerton*, P. C., *supra*. There were in reality two suits, the one *Westerton* v. *Liddell*, relating to the church of *St. Paul's*, Knightsbridge, the other, *Beale* v. *Liddell*, relating to the church of *St. Barnabas*, Pimlico; but the two cases have throughout been taken as one case, and are cited in this little work as *Westerton* v. *Liddell* and *Liddell* v. *Westerton*. A separate report of these cases, edited by Mr. *Moore*, was published by Longman & Co., in 1857, and there is also a report of the

attached to it, although made of wood and movable (*f*). But a massive communion table, provided it be of wood, and movable, is not contrary to the ecclesiastical law (*g*); nor can it be objected that the table is highly carved (*g*); nor will the ordinary interfere on account of its shape (*g*), except, perhaps, in the event of its prominently resembling an altar tomb (*h*); nor can it be objected that there usually rests upon the table a movable ledge of wood for the purpose of holding candlesticks and vessels, which is removed when the cloth is placed upon the table for the purpose of the administration of the Lord's Supper: there does not appear to be anything superstitious or anything improper in the addition of such a ledge (*i*).

As regards the covering of the Lord's table, it should be remembered that at the time of the Holy Communion the covering must be a fair white linen cloth without embroidery or lace of any kind (*k*). The rubric contains a plain intelligible direction, so precise that there can be no room for mistake. The covering is to be a *fair white linen cloth*, and any addition to it of any kind would not fall within the description, but necessarily be forbidden, and would not be consistent with it (*l*).

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judgments of the Court of *Arches* and of the Judicial Committee of the Privy Council by Dr. *Bayford*, published by Butterworths in 1857. These observations do not apply to the proceedings which were subsequently taken against the churchwardens for alleged disobedience to the monition in the *St. Barnabas* case, and which are reported in 14 Moore, P. C., p. 1, and cited from that book as *Liddell* v. *Beale*.

(*f*) *Liddell* v. *Westerton*, P. C., *supra*.

(*g*) *Western* v. *Liddell*, supra.

(*h*) See the observations of Dr. *Lushington* in *Westerton* v. *Liddell*, supra. See Dr. *Bayford's* judgment, p. 21.

(*i*) *Liddell* v. *Beale*, 14 Moore P. C. 1.

(*k*) *Westerton* v. *Liddell*, *Liddell* v. *Westerton* (Arches and P. C.), *supra*.

(*l*) Per Sir *S. Lushington* in *Westerton* v. *Liddell*, supra.

At other times of divine service the covering, as already observed, is to be a carpet of silk, or other decent stuff thought meet by the ordinary of the place, if any question be made of it (*a*). This is enjoined by the 82nd canon, and it is illegal to leave the holy table uncovered during divine service, even on Good Friday. In *the office of the Judge promoted by Elphinstone* v. *Purchas* (*a*), the Dean of Arches (Dr. *Phillimore*), said, "the leaving of the holy table wholly bare and uncovered during divine service is, I believe, a practice without warrant from primitive use or custom; but it is certainly contrary to the 82nd canon, which governs this question, and is therefore illegal."

This expression in the singular, "a carpet," does not exclude the plural, and a variety of cloths may lawfully be used, which, subject to the control of the ordinary, may be embroidered and of different colours. In the Knightsbridge cases various embroidered cloths of different colours were thus used at different seasons of the year. In the case of *St. Paul's*, Knightsbridge, the communion table was covered and decorated with five differently coloured coverings, each of which was embroidered and adorned, and which were varied at different periods of the year as follows:—A white one from the evening of Christmas Eve to the octave of Epiphany inclusive (except on the Feast of St. Stephen and the Holy Innocents), from the evening of Easter Eve to the Vigil of Pentecost, on Trinity Sunday, Purification, Conversion of St. Paul, Annunciation, St. John Baptist, St. Michael, St. Luke, and All Saints. A red one on the Vigil of Pentecost to the next Saturday, Holy Innocents (if on a Sunday), and all other feasts. A violet one on Ash Wednesday to Easter Eve, Advent to Christmas Eve, Ember Week in September, Holy Innocents,

(*a*) See 3 Ad. & Eccl. L. B. 107.

unless on Sunday. A darker violet one on Good Friday and funerals. A green one on all other days. The judge of the *Consistory Court of London*, Dr. *Lushington*, ordered these coverings to be taken away, and one only covering of silk, or other decent stuff, to be substituted in their place. The expression "a carpet," did not indeed *vi termini* exclude the plural, but it gave no authority for it, and if he was to decide the matter as a question of law, he was of opinion that the practice was not justified by the statute, the rubric, or the canon. If it were a question to be governed by the discretion of the court, he regarded it as a downright Popish practice, "better fitted for the gorgeous pageantry of the Church of Rome, than the pure and severe dignity of the Church of England," which it was his duty as ordinary to prevent (*b*). On appeal to the *Court of Arches*, Sir *John Dodson*, without expressly affirming the judgment of the *Consistory Court* on this point as to the law, said, that, supposing the law to have left the question undecided, it was one for the discretion of the ordinary, and he saw no reason for departing from the decision of the Court below (*c*). But the *Judicial Committee* of the *Privy Council* were altogether unable to agree with Dr. *Lushington* in his view of the subject, and whilst they admitted that the matter was one for the discretion of the ordinary, they nevertheless, with the concurrence of the *Archbishop of Canterbury* and the *Bishop of London*, who sat as assessors, overruled his decision and allowed the use of the coverings in question. "It is said," observed the Right Hon. *Pemberton Leigh* (*d*), in delivering the judgment of the Court, "that

(*b*) *Westerton* v. *Liddell*, supra. See 4 Week. Rep., p. 179, and Dr. *Bayford's* judgment, pp. 59, 60.
(*c*) *Liddell* v. *Westerton* (Arches), 5 W. R. 179.
(*d*) Afterwards Lord *Kingsdown*.

the canon orders a covering of silk or some other proper material, but that it does not mention, and therefore by implication excludes, more than one covering." Their lordships are unable to adopt this construction. An order that a table shall always be covered with a cloth surely does not imply that it shall always be covered with the same cloth, or with a cloth of the same colour or texture. The object of this canon seems to be to secure a cloth of a sufficiently handsome description, not to guard against too much splendour. In practice, as was justly observed at the bar, black cloths are in many churches used during Lent, and on the death of the Sovereign, and some other occasions, and there seems nothing objectionable in the practice. Whether the cloths so used are suitable or not is a matter to be left to the discretion of the ordinary. In this case their lordships do not see any sufficient reason for interference, and they must, therefore, advise the reversal of the sentence as to the cloths used for the covering of the Lord's table during the time of divine service, both with respect to St. Paul's and St. Barnabas (*a*).

As an adjunct to the communion table the churchwardens may lawfully provide (and indeed in every case where the existence of a niche in the chancel wall, of an altar-monument in the chancel, or the like, which may be used for the same purpose, does not dispense with the necessity for it, ought to provide), a credence table, on which the bread and wine may be placed before the consecration, so as to enable the priest decently and reverently to comply with that requirement of the rubric, which directs him, after he shall have presented and placed the alms for the poor and other devotions of the people upon

(*a*) *Liddell* v. *Westerton*, P. C., 5 W. R. 470. See p. 477 of that book.

the holy table, to place upon the table so much bread and wine as he shall think sufficient (*b*). In *Faulkner* v. *Litchfield and Stearn* (*c*), indeed, Sir *Herbert Jenner Fust* pronounced credence tables to be illegal, as being adjuncts not recognized by the Church, and in deference to this opinion, Dr. *Lushington* in *Westerton* v. *Liddell* (*d*), and Sir *John Dodson* in *Liddell* v. *Westerton* (Arches) (*e*), pronounced against their legality ; but these decisions were overruled by the *Judicial Committee* of the *Privy Council* upon an appeal from the *Court of Arches* in the last named case. Their judgment on this head is as follows :—

"The next question is as to credence tables. Here the rubrics of the prayer book become important. Their lordships entirely agree with the opinions expressed by the learned judges in these cases, and in *Faulkner* v. *Litchfield,* that in the performance of the services, rites, and ceremonies ordered by the prayer book the directions contained in it must be strictly observed ; that no omission and no addition can be admitted ; but they are not prepared to hold that the use of all articles not expressly mentioned in the rubric, although quite consistent with, and even subsidiary to the service, is forbidden. Organs are not mentioned; yet, because they are auxiliary to the singing, they are allowed. Pews, cushions to kneel upon, pulpit cloths, hassocks, seats by the communion table, are in constant use, yet they are not mentioned in the rubric. Now, what is a credence table ? It is simply a small side table, on which the bread and wine are placed before the consecration,

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(*b*) See the rubrics immediately following the offertory sentences in the order for the administration of the Lord's Supper or Holy Communion.

(*c*) 1 Roberts, 184.

(*d*) 4 W. R. 164. See Dr. *Bayford's* judgment, p. 17.

(*e*) *Liddell* v. *Westerton* (Arches), 5 W. R. 470.

having no connection with any superstitious usage of the Church of Rome. Their removal has been ordered on the ground that they are adjuncts to an altar; their lordships cannot but think that they are more properly to be regarded as adjuncts to a communion table. The rubric directs that at a certain point in the course of the communion service (for this is, no doubt, the true meaning of the rubric) the minister shall place the bread and wine on the communion table, but where they are to be placed previously is nowhere stated. In practice they are usually placed on the communion table before the commencement of the service, but this certainly is not according to the order prescribed. Nothing seems to be less objectionable than a small side table, from which they may be conveniently reached by the officiating minister, and at the proper time transferred to the communion table. As to the credence tables their lordships therefore must advise a reversal of the sentence complained of" (*a*.)

And the churchwardens are, against the time of every communion, at the charge of the parish, with the advice and direction of the minister, to provide a sufficient quantity of fine white bread, and of good and wholesome wine, for the number of communicants that shall from time to time receive there; which wine is to be brought to the communion table in a sweet and clean standing pot, or stoop of pewter, if not of purer metal (*b*), and are to take care that the church be in like manner provided with a fair chalice or communion cup, with a cover, and one or more flagons (*c*), and also with one decent basin at least, wherein the deacons, churchwardens,

(*a*) *Liddell* v. *Westerton*, P. C., 5 W. R. 470. See p. 477, of that book.
(*b*) Can. 20.
(*c*) Ayl. Par. 304; Lindw. 252.

or other fit persons appointed for that purpose, shall receive the alms for the poor and other devotions of the people at the offertory (*d*).

They are also to see that there be a decent font of stone, with a cover, in every church and chapel where baptism is to be administered; and that the same be at or near the west end of the church, in the same manner as anciently and usually fonts have stood (*e*).

They are also, at the common charge of the parishioners, to provide a convenient seat for the minister to read service in (*f*), and a comely and decent pulpit, to be set in a convenient place within the church, by the discretion of the ordinary of the place (if any question do arise), and to be there seemly kept for the preaching of God's word (*g*): and also a decent and comely surplice with sleeves, to be worn by every minister saying the public prayers, or ministering the sacraments or other rites of the church. And if any question arise touching the matter, decency, or comliness thereof, the same is to be decided by the discretion of the ordinary (*h*).

There is strong ground for contending that the churchwardens ought also in strictness to provide a low desk, anciently called the *falled stool*, to be placed in the midst

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(*d*) Rubric to the order for the administration of the Holy Communion. At a recent triennial visitation of the late *Bishop of Exeter* the churchwardens of St. Olave, Exeter, presented their minister for having introduced a novelty in the collection, "using bags for the alms, instead of the decent basin prescribed in the rubric." The Right Rev. Prelate in reply said, "The bags for receiving the alms are clearly contrary to the law of the church, which is precise in prescribing a decent basin to be provided by the parish for the purpose." See "The Times" for Saturday, May 9, 1857.

(*e*) Can. 81.

(*f*) Can. 82.

(*g*) Can. 83.

(*h*) Can. 58.

of the church, before the chancel door, at which the litany is to be said or sung (*a*).

They may also, if they think fit, furnish the communion table with two candlesticks and candles, not, indeed as ornaments, but as necessaries, provided they be of reasonable size, and that the candles are lighted only when necessary in consequence of darkness (*b*).

It would seem also that they might lawfully put up a rood screen with brazen or other doors dividing the nave from the chancel; but it would, perhaps, be more prudent not to do so without the authority of a faculty. In *Westerton* v. *Liddell* (*b*), Dr. *Lushington* refused to order such a screen to be removed, but he said that in his opinion such separations between the chancel and the nave were objectionable, and that he would not advise the bishop to consecrate a church so fitted up.

And a cross may lawfully be annexed to such screen, or placed elsewhere in the church as a mere ornament or embellishment, although it may not be affixed to the communion table for the reason already given (*c*), or used in any of the services or ministrations of the church (*d*).

The lawfulness of having crosses in churches has been

(*a*) See a note of Bishop *Andrews* in Dr. *Nicholl's* Additional Notes to his Book on the Common Prayer, p. 22, col. 1, and Wheatley on the Common Prayer, p. 161. See also the injunctions of Edward, VI., A.D., 1547, and those of Eliz. A.D. 1559, in Bishop *Sparrow's* Collection, pp. 8 and 72.

(*b*) 4 W. R. 167. See Dr. *Bayford's* judgment, p. 60. And see *Martin* v. *Mackonochie*, (Arches); 2 Ad. & Eccl. L. R., 116; (P.C.) 5 Moore, P. C. (N. S.) 501; 2 P. C. Law Rep. 365. *The office of the Judge promoted by* Bishop *Sumner* v. *Wix*, 3 A. & E. L. R. 58. *The office of the Judge promoted by Elphinstone* v. *Purchas*. *Ib.* 66.

(*c*) *Supra*, p. 50.

(*d*) *Liddell* v. *Westerton*, P. C., 5 W. R. 470. In the *St. Barnabas* case a monition went to the churchwardens "to

the subject of much doubt and controversy, chiefly from a misapprehension of the meaning of the word "ornaments" in the introductory rubric to the Book of Common Prayer. The rubric is as follows :—"And here is to be noted that such ornaments of the Church and of the ministers thereof at all times of their ministrations shall be retained and be in use, as were in the *Church of England* by the authority of parliament in the second year of the reign of King Edward VI."

In the case of the Rev. *W. G. Parks Smith*, of *St. John's Chapel, Torquay* (*e*), the *Bishop of Exeter*, attributing to the word "ornaments" in this rubric its popular meaning in modern usage, forbade the placing of vases of flowers, or of a cross, upon the communion table, as it could not be shown that these ornaments were in use in the Church of England by the authority of parliament in the second year of the reign of King Edward VI., as required by the rubric above referred to.

In the subsequent *Knightsbridge* cases (*f*), Dr. *Lushington* in the *Consistory of London*, and Sir *John Dodson* in the *Arches*, attributed the same meaning to the word

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remove the structure of stone used as a communion table in the said church, together with the cross on or near the same." The stone structure had been removed out of the church, and the metal cross which stood upon it, and was, in a sense at least, affixed to it, had been placed on the sill of the centre compartment of the eastern window of the chancel, above the surface of the communion table, and entirely disconnected therewith. It was held that the cross remained in the church as an ornament, and not an unusual or improper one, and that the monition had been complied with. See *Liddell* v. *Beale*, 14 Moore, P. C. 1.

(*e*) See this case reported in *Stephen's* Laws of the Clergy, p. 1083, and in the Appendix to Dr. *Bayford's* judgment in *Westerton* v. *Liddell*, p. 1.

(*f*) *Westerton* v. *Liddell*, 4 W. R. 167; *Liddell* v. *Westerton*, 5 W. R. 179.

"ornaments" in the rubric, and for the same reason the former learned judge pronounced against the use of crosses in churches altogether, whilst the latter affirmed his judgment rather upon the ground that crosses had been denounced and prohibited, if not as "images," at least as *monuments of idolatory and superstition*, by the injunctions of King Edward VI., which, contrary to the opinion of Dr. *Lushington*, he conceived to have been of binding parliamentary authority.

But the *Judicial Committee* of Her Majesty's *Privy Council* have decided that the word "ornaments" in this rubric is not used in its popular sense according to modern usage; but in the larger sense of the word "*ornamentum*," which according to the interpretation of *Forcellini's* dictionary is used *pro quocunque apparatu seu implementu*,—that all the several articles used in the performance of the services and rites of the Church, vestments, books, cloths, chalices, patens, and the like, are ornaments within the meaning of the rubric; but that articles which are not so used, although articles of decoration or embellishment and ornaments in the popular meaning of the term, are not "ornaments" within the meaning of the rubric; and that although the rubric excludes all use of crosses in the services, the general question of crosses not used in the services, but employed only as decorations of churches, is entirely unaffected by the rubric.

The *Judicial Committee* of the *Privy Council* have also decided against the view taken by Sir *John Dodson;* and, by the advice which they have been enabled to give Her Majesty, have happily relieved her subjects from the painful reflection that the cross, the sacred symbol of their religion, is to be regarded by them as an unlawful ornament, to be avoided as a *monument of idolatory and superstition* (*a*).

(*a*) *Liddell* v. *Westerton*, P. C., 5 W. R. 470.

The conclusion of their judgment on this head is in the following words :—

"Upon the whole their lordships, after the most anxious consideration, have come to the conclusion that crosses, as distinguished from crucifixes, have been in use, as ornaments of churches, from the earliest periods of Christianity; that when used as mere emblems of the Christian faith, and not as objects of superstitious reverence, they may still lawfully be erected as architectural decorations of churches; that the wooden cross erected on the chancel screen of St. Barnabas is to be considered as a mere architectural ornament; and that as to this article, they must advise Her Majesty to reverse the judgment complained of. Their lordships hope and believe that the laws in force respecting the consecration of any building for a church, and which forbid any subsequent alteration without a faculty from the ordinary, will be sufficient to prevent any abuse in this respect" (*b*).

It has also happily been decided by the *Judicial Committee* of the *Privy Council* in the recent case of *Phillpotts* v. *Boyd and others* (*c*), affirming the judgment of the *Dean* of *Arches*, who reversed that of the present Bishop of *Exeter*, acting under the advice of Sir *Henry Singer Keating*, then one of the Judges of the Court of *Common Pleas*, as his assessor, in the now celebrated *Exeter* Reredos case, that a reredos containing in bas-relief sculptured representations of the ascension of our Lord, the transfiguration, and the descent of the Holy Ghost on the day of Pentecost, and having an Angel on each side of it, and two other Angels, one on each side of the cross which surmounts it, is a lawful

(*b*) See 2 W. R. 475. This judgment, so far as it relates to the construction of the rubric, is given verbatim in the Appendix.

(*c*) Delivered by Lord *Hatherley*, Feb. 25th, 1875.

decoration, and that it is not open to condemnation on the ground that the sculptures contained in it are monuments of idolatry and superstition, or that they tend to the encouragement of the Romish doctrine concerning worshipping and adoration of images condemned in the 22nd article of religion; and they said that they were unable to distinguish it from the numerous sculptured representations in cathedrals and parish churches, which long experience had proved were capable of remaining there without being the occasion of any superstition, but that they desired it to be clearly understood that nothing decided in the case affected the superstitious observances referred to in the 22nd article of religion.

The effect of the introductory rubric to the Book of Common Prayer above referred to is to set up as a binding authority on the subject to which it relates the first prayer book of King Edward VI. This book, indeed, was not required to be generally used, and did not come into general use until the third year of that King's reign; but it was established by the authority of an Act of parliament passed in the second year of his reign (*a*), and is universally admitted to be referred to by the present rubric. Whether this book is thus referred to as the sole parliamentary authority has been the subject of much doubt. Sir *John Dodson* thought not (*b*). Dr. *Lushington* inclined to the opinion that it was, but he was perplexed by the difficulty that although there were words in that prayer book describing the ornaments of the ministers, there were none which applied to ornaments of the church, in his understanding of this expression (*c*). The construction which the *Judicial*

(*a*) 2 & 3 Ed. 6, c. 1.
(*b*) See *Liddell* v. *Westerton* (Arches), 5 W. R. 179.
(*c*) See *Westerton* v. *Liddell*, 4 W. R. 167, and see *Dr. Bayford's* judgment, p. 28.

Committee of the *Privy Council* have put upon the word "ornaments" has removed this difficulty, and it is now finally settled that the rubric refers to the first prayer book of King Edward VI., as the sole binding parliamentary authority on the subject of the ornaments of the Church and of the ministers thereof (*d*).

In the recent case of *The office of the Judge promoted by Elphinstone* v. *Purchas*, in the Court of *Arches* (*e*), Dr. *Phillimore*, acting upon this distinction between "ornaments" and "decorations," held that it was lawful to place vases of flowers on the holy table, and to keep them there during the performance of divine service, provided they were used as decorations only. He said that he had considered the Bishop of *Exeter's* judgment on the point (*f*), of which he thought it enough to say that it was given nearly ten years before the decision in *Liddell* v. *Westerton* had settled the case and drawn the distinction between ornaments (*ornamenta*) and decorations.

It should be mentioned here that it has recently been decided in the *Consistory Court* of *London*, by Dr. *Tristram*, the Chancellor of the Diocese, that a baldachino, or altar canopy, is an illegal ornament within the meaning of this rubric, and not a decoration (*g*).

Of the ornaments of the Church nothing further need be said here, but a few words must be added on the ornaments of the ministers, as provided by the first prayer book of King Edward VI.

This book contains two rubrics relating to the ornaments or ministers.

(*d*) See *Westerton* v. *Liddell*, P. C., 5 W. R. 470.
(*e*) 2 Ad. & Eccl. L. R. 66. See p. 106,
(*f*) See the case of the *Rev. W. G. Park Smith*, *ante*, p. 59.
(*g*) *White and others* v. *Bowron*, 4 Ad. & Eccl. L. R. 207.

One of these, directing the use of the surplice in the ordinary ministrations, and recommending "that graduates, when they do preach, should use such hoods as pertaineth to their several degrees," will be found in the last leaf of the book.

The other, relating only to the habits which are to be used at the ministration of the Holy Communion, is at the beginning of the book, and runs thus :—

"Upon the day and at the time appointed for the ministration of the Holy Communion, the priest that shall execute the holy ministry shall put upon him the vesture appointed for that ministration, that is to say, a white albe plain, with a vestment or cope. And where there be many priests or deacons, there so many shall be ready to help the priest in the ministration as shall be requisite, and shall have upon them likewise the vesture appointed for the ministry, that is to say, albes with tunicles."

Acting on the apparently plain and unmistakable meaning of this rubric, Sir *Robert Phillimore* in the recent case of *the Office of the Judge promoted by Elphinstone* v. *Purchas* (*a*), held that these vestments were legal and might lawfully be worn at the communion service.

The learned judge said :—"As to the construction of this rubric according to the general principles of legal interpretation, I must say that after a repeated and attentive perusal of the language, it does, *per se*, appear to me as plain and simple as any which is to be found in any statutory enactment. Lord Coke says, that '*loquendum est ut vulgus*' is to be assumed as the principle which underlies the language of enactments : and I really do not believe that any person of plain common sense and ordinary intelligence, who reads this language uninfluenced by considerations

(*a*) 3 Ad. & Eccl. L. R. 66; see p. 78.

arising from supposed consequences, would hesitate as to the interpretation of it. He would say with the Privy Council in *Liddell* v. *Westerton* (*b*), it 'obviously' meant that the same ornaments which were used under the first prayer book of Edward VI. 'may still be used.' He would perfectly understand why the Puritan party objected to this rubric 'forasmuch as this rubric seemeth to bring back the cope, alb, &c., and other vestments forbidden by the Common Prayer Book, 5 & 6 Edw. VI, and so our reasons alleged against ceremonies under our eighteenth general exception, we desire it may be wholly left out' (*c*); and why the House of Lords should at the same time suggest as a consideration 'whether the rubric should not be mended where all vestments in time of divine service are now commanded, which were used 2 Edw. VI.' (*d*). And I am convinced that if the subject to which the language refers were not one which excites some of the strongest passions and feelings of our nature, but was one of an ordinary indifferent and civil character, no dispute would ever have been raised with respect to the plain and natural meaning of that language" (*e*).

The late Bishop of *Exeter*, in the well-known *Helston* case, had previously put the same construction upon this rubric. The Right Rev. Prelate said that if the parish should provide the minister with a white alb with a vestment or cope, it would be his duty to wear them at the communion service (*f*).

This view of the rubric has not, however, been sustained

(*b*) *Moore's* Special Report, at p. 365.
(*c*) Cardwell's Conferences, p. 314.
(*d*) *Id.* p. 274.
(*e*) See 2 Ad. & Eccl. L. R. pp. 78, 79.
(*f*) See *Best's Helston case.* 1 *Stephens's* Book of Common Prayer, 378; 2 Stephens's Eccl. Act, 2046.

by the *Judicial Committee* of the *Privy Council*, who decided in the case of *the office of the Judge promoted by Hebbert* v. *Purchas* (*a*), (which was an appeal from the judgment of the Court of *Arches* in *Elphinstone* v. *Purchas* (*a*), Colonel *Elphinstone* having died and *Hebbert* been substituted promoter of the suit in his stead), that the ornaments rubric, as explained by the injunctions of Queen Elizabeth (A. D.) 1559, and the advertisements of Elizabeth (A. D.), 1564, made pursuant to the Act of Uniformity 1 Eliz. c. 2, and explained by subsequent visitation articles,—when construed with the canons of 1603–4, and the Act of Uniformity 13 & 14 Car. 2, c. 4,—does not permit the use by the minister while officiating at the Holy Communion of the chasuble, the alb, or the tunicle, and that the use of such vestments by him while so officiating is illegal (*b*).

But this decision of the *Judicial Committee* of the *Privy Council*, which was made in an undefended case, has not met with general approval, and the correctness of their judgment on the illegality of these vestments and upon certain other matters is now being questioned in a pending appeal by the Rev. *Mr. Mackonochie* against the decision of Sir *Robert Phillimore* in the subsequent case of *Martin* v. *Mackonochie*, in which last-named case that learned judge, feeling himself bound by the authority of the *Judicial Committee*, refused to allow the legality of these vestments to be further considered in his court, and decided against their legality.

If the ultimate decision of the court of final appeal should be in favor of the construction of the ornaments rubric adopted by Sir *Robert Phillimore* and the late Bishop of *Exeter*, and of the validity of these vestments, it would,

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(*a*) 3 L. R. (P. C.), 605.
(*b*) See *Hebbert* v. *Purchas*, 3 L. R. (P. C.) 605.

of course, be legal in the churchwardens, if not obligatory on them, to provide these vestments for the use of the minister, in addition to the surplice elsewhere directed to be provided (*c*); but in the present state of the law, and with the existing judgment of the ultimate court of appeal, however unsatisfactory that judgment may be deemed, against their validity, it need scarcely be added that they ought not to do so.

The churchwardens are also to see that the church be provided with a large Bible of the last translation (*d*), a Book of Common Prayer (*e*), and the books of homilies allowed by authority (*f*).

The Ten Commandments are to be set, at the charge of the parish, upon the east end of every church and chapel, where the people may best see and read the same; and other chosen sentences are, at the like charge, to be written upon the walls of the said churches and chapels in places convenient (*g*). But it will be sufficient if the Ten Commandments are set up as nearly according to the canon as the nature of the structure will permit; and where the structure was such that they could not have been well seen by the people if put up against the chancel wall, it was held that the canon had been substantially complied with by placing them against the walls on each side of the chancel screen on the east side of the nave. It was further held that it was not necessary that they should be written or printed on or against the wall, but that they might be com-

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(*c*) *Ante*, p. 64.
(*d*) Can. 80; Gibs. 202.
(*e*) Can. 80; 1 Eliz. c. 2, s. 19; 13 & 14 Car. 2, c. 4.
(*f*) Can. 80.
(*g*) Can. 82. That the ordinary will on application compel this to be done, see *Westerton* v. *Liddell*, 4 W. R. 167; *Liddell* v. *Westerton*, 5 W. R. 179.

prised in tablets affixed thereto, and that it is sufficient if they are written or printed in letters which can be easily deciphered and understood by any one capable of reading the ordinary writing or printing which in ordinary cases is used (*a*).

The Table of Degrees of Marriages prohibited is also in every church to be publicly set up at the charge of the parish (*b*).

The churchwardens are also to provide and have a strong chest, with a hole in the upper part thereof, to be provided at the charge of the parish (if there be none such already provided), having three keys ; of which one shall remain in the custody of the parson, vicar, or curate, and the other two in the custody of the churchwardens for the time being: which chest they are to set or fasten in the most convenient place, to the intent the parishioners may put into it their alms for their poor neighbours (*c*).

They ought also, at the cost of the parish, to provide a

(*a*) *Liddell* v. *Beale*, 14 Moore, P. V. 1.

(*b*) Can. 99.

(*c*) Can 84. The churchwardens are earnestly exhorted never to be without the poor-chest in their churches. The duty of the parishioners to contribute to this chest and the blessings likely to follow their contributions are pointed out, and the due appropriation of their alms provided for, by the latter part of this canon ; the words are as follows :—"And the parson, vicar, or curate, shall diligently from time to time, and especially when men make their testaments, call upon, exhort, and move their neighbours to confer and give as they may well spare to the said chest, declaring unto them, that whereas heretofore they have been diligent to bestow much substance, otherwise than God commanded, upon superstitious uses, now they ought at this time to be much more ready to help the poor and needy, knowing that to relieve the poor is a sacrifice which pleaseth God, and that also whatsoever is given for their comfort is given to Christ himself, and is so accepted of him that he will mercifully reward the same. The which alms and devotion of the people, the keepers of the keys shall yearly, quarterly, or oftener (as need requireth), take out of the chest, and distribute the same in the presence

decent bier for the burial of the dead (*d*), and a bell and rope to ring to church and toll at funerals (*e*). And finally, they are in like manner to supply register books for the registration of baptisms and burials (*f*), a proper book from which all banns of marriage are to be published (*g*), a proper book wherein to record the names and licenses of the strangers who are admitted to preach in their church (*h*), a book for the churchwardens' accounts, a true note and terrier of all the glebe lands and other possessions belonging to the church (*i*), and a chest with lock and keys, wherein to keep these books (*k*).

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of most of the parish, or six of the chief of them, to be truly and faithfully delivered to their most poor and needy neighbours." See also the rubric to the Visitation of the Sick.

(*d*) Lind. 252.

(*e*) *Pearce and Hughes, Churchwardens of Clapham* v. *The Rector, Parishioners, and Inhabitants of the same Parish,* 3 Hagg. C. R. 10 ; *The Burial Board of St. Margaret, Rochester* v. *Thompson,* 6 L. R. (C. P.) 445.

(*f*) Can. 70 ; 52 Geo. 3, c. 146. The canon and statute apply equally to the registration of marriages, but the *statute* so far as it relates to the registration of marriages, is *expressly* repealed by 6 & 7 Will. 4, c. 86, see sect. 1, and by sect. 30 of the last named Act it is provided that marriage register books shall be furnished to the incumbent by the Registrar General, and that the costs shall be paid by the churchwardens and overseers of the poor out of the moneys in their hands as such churchwardens and overseers.

(*g*) 4 Geo. 4, c. 76 s. 6.

(*h*) Can. 52.

(*i*) Can. 87. The original terrier is by the canon to be deposited in the bishop's registry, but it is convenient that a copy of the same exemplified be kept in the church chest. See God. Append. 12. For the form of a terrier see Burn's Eccl. Law, tit. "Terrier."

(*k*) Can 70, 52 Geo. 3, c. 146, s. 5. The vestry book is to be provided by the churchwardens and overseers of the poor out of the poor rate, and not by the churchwardens out of the church rate ; *post,* c. 2, s. 2 ; 58 Geo. 3, c. 69, Appendix ; but, of course, this only applies to the vestry of a civil parish or township. Where the vestry is constituted for ecclesiastical purposes only, as in districts under the Church Building Acts, the book must be provided by the churchwardens.

The churchwardens are a corporation only so far as relates to the *goods* and *chattels* of the church, and have no legal interest in any lands belonging to the church, and are not a corporation in respect of land, except in the city of *London* by *special custom*. But there, by such special custom, the churchwardens with the minister make a corporation for lands as well as for goods, and may, as such, hold, purchase, take, and demise lands for the use of the church, and sue and be sued on account thereof, as well as for goods and chattels; and this is alleged as a reason for that other custom (*a*), which hath also obtained in London, for the parishioners there to choose both churchwardens exclusive of the minister: for, say they, if the minister should there choose one of the churchwardens according to canon, he with the said churchwardens, as the major part of the corporation, may dispose of the lands to the damage of the parish, and therefore it is not safe there to lodge so great a trust in him: but there being no such custom in any other part of the kingdom, everywhere else the churchwardens only make the corporation for the use of the church, and are such only for the goods belonging to the same, and not for lands (*b*).

(*a*) See *ante*, p. 23. The language of Dr. *Prideaux* has been retained, but the churchwardens are not in strictness a corporation; they have been more correctly described as a *quasi* corporation. See *ante*, p. 49, and note (*b*).

(*b*) Tyrw. Prid. 128, 130. Churchwardens *jointly* with the overseers of the poor, are, however, authorized by statute (see 59 Geo. 3, c. 12), to purchase, accept, and hold, *in the nature of a body corporate*, lands for the use of the poor and for certain other parochial purposes; but as this power is given to them in their character of overseers of the poor and not as ecclesiastical officers, it does not fall within the province of this little work to enter more fully upon the subject. See the following cases upon the construction of this statute: *Doe dem. Jackson* v. *Hilly*, 10 B. & C. 885; 5 M. & Ry. 706, S. C.; *Doe dem. Higgs* v. *Terry*, 4 A. & E. 274; 5 N. & M. 556. S. C.; *Doe dem. Hobbs* v.

As regards the fabric of the church and the churchyard, the churchwardens are not a corporation in respect thereof, nor have they any property therein, for the freehold is in the parson, and not in the parishioners, or in the churchwardens in trust for them : all actions therefore touching the freehold must be brought in the name of the parson, and not in the name of the churchwardens or the parishioners (*c*).

Cockell, 4 A. & E. 478 ; 6 N. & M. 179, S. C. ; Ex parte *Annesley*, 2 Y. & C. 350 ; *Alderman* v. *Neal*, 4 M. & W. 704 ; *Allason* v. *Hook*, 1 P. & D. 183 ; *Woodcock* v. *Gibson*, 4 B. & C. 462 ; 6 D. & R. 524, S. C. ; *Wrench* v. *Lord*, 4 Scott, 381 ; *Phillips* v. *Pearse*, 5 B. & C. 483 ; 8 D. & R. 43, S. C. ; *Smith* v. *Atkins*, 8 M. & W. 362 ; *Goldsworth* v. *Knights*, 11 M. & W. 337 ; *Attorney-General* v. *Lewin*, 8 Sim. 366 ; In re *Paddington Charities*, *ib.* 629 ; *Ward* v. *Clark*, 12 M. & W. 474 ; *Doe dem. Edney* v. *Billet*, 14 L. J. Q. B. 343 ; *Gavill* v. *Ulter*, 9 Jur. 1081 ; *Uthwait* v. *Elkins*, 13 M. & W. 1772 ; *Rumball* and *Gough* v. *Mant*, 8 Q. B. 382 ; *Churchwardens of St. Nicholas, Deptford* v. *Sketchley*, 8 Q. B. 394 ; *Attorney-General* v. *Salkeld*, 22 L. J. Ch. 741 ; *Attorney-General* v. *Magdalen College, Oxford*, 18 Jur. 363.

(*c*) Prid. 130 Com. Dig. Eglise ; *Walter* v. *Montague* and *Lamprell*, 1 Curt. 253. The freehold of the church and churchyard (except so far as it may be otherwise provided by the endowment in the case of vicarages) is in the rector, whether lay or spiritual ; but the possession of the *whole* church including the chancel, for there is no difference in this respect between the chancel and the rest of the church, and of the churchyard is in the incumbent, whether rector, vicar, or perpetual curate : *Jones* v. *Ellis*, 2 Y. & J. 265 ; *Griffin* v. *Deighton*, 5 B. & S. 93 ; 33 L. J. Q. B. 29, affirmed in error, 5 B. & S 93 ; 33 L. J. Q. B 181. The vicar or perpetual curate is entitled to access to them at all times, and the lay rector has not, as against him, any right to the possession or control of them, *Griffin* v. *Deighton*, supra. He may maintain in his own name a possessory action against wrong doers, even though they be the churchwardens, *Jones* v. *Ellis*, supra, and in an indictment for larceny of property affixed to the church the ownership may be laid in him : *R.* v. *Hickman*, 2 East, P. C. 503. But, except where the endowment provides otherwise, he is only entitled to the possession for spiritual purposes. He has not such a possession as will exclude the lay rector from the profits of the soil. He is not entitled to the herbage of the churchyard himself, nor can he sue the lay rector

But although the churchwardens have no property in the church or churchyard, they have, in common with the rest of the parishioners, a right to the use of the edifice for the celebration of divine service, and of the holy sacraments and ceremonies of our religion, and of the churchyard for the purpose of access to the church and vestry on all fit occasions, and for the burial of the dead; and in consideration of this privilege, which is equally the right of every

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or his tenant for depasturing the churchyard with sheep: *Greenslade* v. *Darby*, 3 L. R. Q. B. 421; 37 L. J. Q. B. 137. The freehold of subscription churches and chapels under 5 Geo. 4, c. 103, and 1 & 2 Will. 4, c. 38, is by 5 Geo. 4, c. 103, s. 14, and 1 & 2 Will. 4, c. 38, s. 9, vested in certain trustees and their successors for ever, by such names and styles as are specified in the respective sentences of consecration. By the 13th sect. of 8 & 9 Vict. c. 70, the freehold of the site of every church of which the ecclesiastical commissioners may have accepted or shall accept, a conveyance under the provisions of the various Church Building Acts, is after consecration vested in the incumbent of such church; and the freehold of every burial ground of which the commissioners shall in like manner have accepted or accept a conveyance, is, after consecration, vested in the incumbent of the church to which such burial ground shall belong; or if there shall be no such incumbent, then in such body or persons as the commissioners may, with the consent of the bishop, direct, until there shall be an incumbent, and then in such incumbent. And by sect. 10 of 19 & 20 Vict. c. 104, the freehold of the site of the church of any new parish created under that Act, under 6 & 7 Vict. c. 37, or under 7 & 8 Vict. c. 94; and of the churchyard burial ground, and vaults belonging thereto, with the rights therein and the appurtenances thereof, is vested in the incumbent; but in case the same shall be vested in any vestry by any local Act of parliament, then not without the consent of such vestry. That this section applies only to burial grounds, &c., belonging by *right or user* to the church of the new parish, and that it does not extend to a churchyard of the old parish locally adjoining it and formerly belonging to it, but which had ceased to belong to it on such church ceasing by statute to be the old parish church, see *Champneys* v. *Arrowsmith*, 3 L. R. C. P. 107; 36 L. J. C. P. 265. That the freehold of a chapel or lesser chancel may be vested in fee in a private person, though such chapel or chancel form an integral part of, and is under the same roof with the parish church, see *Chapman* v. *Jones*, 4 Eq. Ca. L. R. 273.

parishioner, the common law of the land imposes upon the parish not only the duty of providing the necessary furniture of the church, but also of keeping in good and sufficient repair the nave of the church and the churchyard, and upon the churchwardens, as the guardians and keepers of the church and the representatives of the body of the parish, the duty of effecting the necessary repairs by means of a rate to be levied upon the parishioners (*a*); and this is still the duty of the parishioners, and also of the churchwardens, if they can procure the requisite funds for the purpose by a rate or otherwise, notwithstanding the passing of the "Compulsory Church Rate Abolition Act, 1868" (*b*).

This duty of repairing the church, however, at the expense of the parishioners, does not extend to the chancel; for, by the general law, the parson is bound to repair the

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(*a*) Prid. 27; and see *Walter* v. *Montague* and *Lamprell*, 1 Curt. 253; *Nunn* v. *Varty* and *Mopsey*, 3 Curt. 352. As to the repair of churchyards which have been closed under the Burial Acts, and when it is to be effected by the churchwardens, see 18 & 19 Vict. c. 128, s. 18; and that this provision does not apply to a burial ground which is not the burial ground of any parish, but the property of private persons, see *R.* v. *The Burial Board for the Parishes of St. John, Westgate, and Elswick in the borough and county of Newcastle-upon-Tyne*, 1 B. & S. 679. That the closing of a churchyard under the Burial Acts does not affect the question of title, and that the same persons—in ordinary cases, the rector or vicar—are entitled to the annual proceeds of the invested money of a closed churchyard under these Acts as would have been entitled thereto if the churchyard had not been closed, and that the burial board, or the parish, though they contributed to the purchase of the new burial ground, are not entitled, see In re, *St. Pancras Burial Board*, 3 L. R. (Eq.) 173; *Champneys* v. *Arrowsmith*, 3 L. R. (C. P.) 107 36 L. J. C. P. 265; Ex parte *the Rector of St. Martin's, Birmingham*, 9 L. R. (Eq.) 23; 40 L. J. (Ch.) 69; *Campbell* v. *The Corporation of Liverpool*, 9 L. R. (Eq.) 579; Ex parte *the Rector of Liverpool*, 11 L. R. (Eq.) 23; 40 L. J. (Ch.) 69.

(*b*) 31 & 32 Vict. c. 109.

chancel, if there be no custom for the parish, or the owner of some particular estate to do it (*a*).

But a custom for the parishioners to repair the chancel is good, and such custom prevails in the city of *London*, in the city of *Norwich* and, according to Dr. *Prideaux*, in most other cities and large towns in England where there are no tithes to be charged for the repair or to be sequestered for it if neglected (*b*).

And although a custom for the parishioners to repair the chancel is usually found to prevail (if at all) in *cities* and *towns*, such custom is good, and may also exist in *country parishes*. Thus, in *The Bishop of Ely* v. *Gibbons and Goody* (*c*), in which the question was, whether the *Bishop of Ely*, as rector of the country parish of *Clare* in the *diocese of Norwich* (the rectory of which parish was attached to the bishopric of Ely), was bound to repair the chancel of the parish church, or whether the burden of repairing the chancel was thrown upon the parishioners by special custom, an issue was raised in *prohibition*, for the purpose of ascertaining whether such special custom existed.

The jury found their verdict in the following terms:—"In the parish of *Clare* there is and hath been an ancient and laudable custom for the parishioners to repair the chancel." And this verdict was held binding by the Court *Christian*, who held the custom good, and said they would infer an original composition to support it if necessary.

The canon which regulates the duties of churchwardens

(*a*) Gibs. Cod. 199.

(*b*) Prid. 27. See *Hawkins' case*, 5 Mod. 390; and see such custom alleged with reference to the city of Norwich in *Steward* v. *Bateman*, 3 Curt. 201; and *Steward* v. *Francis*, 3 Curt. 299.

(*c*) 5 Hagg. Ecc. 156. See also *The Duke of Rutland* v. *Bagshaw and another*, 19 L. J., Q. B. 234.

with reference to the repairs of churches is the 85th—it is entitled, *Churches to be kept in sufficient reparation*, and is as follows:—"The churchwardens or questmen shall take care and provide that the churches be well and sufficiently repaired, and so from time to time kept and maintained. That the windows be well glazed, and that the floors be kept paved, plain and even, and all things there in such an orderly and decent sort, without dust or anything that may be either noisome or unseemly, as best becometh the house of God, and is prescribed in a homily to that effect. The like care they shall take that the churchyards be well and sufficiently repaired, fenced, and maintained with walls, rails, or pales, as have been in each place accustomed, at their charges unto whom by law the same appertaineth; but especially they shall see that in every meeting of the congregation peace be well kept."

This canon is only declaratory of the common law of the land, for it is the ancient doctrine of the law, that by the custom of England the inhabitants are bound to repair the body of the church.

This is undoubtedly a legal truth as old as any in our books. Lord *Coke* in his commentary on the statute or writ of *circumspecte agatis* (2 *Inst.* 489), and that of the *articuli cleri* (*ib.* 653), and in numerous other places, distinctly lays it down, and all the authorities are the same way (*d*).

These repairs, &c., which the churchwardens are thus

(*d*) Per *Denman*, C. J., in delivering the judgment of the court in *Burder* v. *Veley*. See Mr. Johnson's edition of this celebrated case (the *Braintree case*), page 163, and see *post*, c. 3, s. 3. See also S. C. 12, A. & E. 233; 4 P. & D. 42. See also *Veley* v. *Burder*, 12 A & E. 265; *Gosling* v. *Veley and Joslin*, 12 Q. B. 328; S. C. in Dom. Proc., House of Lords, Cas. 679; 17 Jur. 939; and see Mr. Attree's *edition of this case in the* House of Lords, *published by* Shaw & Sons.

bound to superintend at the costs and charges of the parish, may be divided into two classes :—

1st. The repairs of the *church.*

2nd. The repairs of the *churchyard.*

The subject matter of the first may again be subdivided into two classes, viz. :—*First*, the goods and utensils of the church, such as books, communion table, &c., and the other requisites for the celebration of divine service ;—*Secondly*, the fabric of the church itself, and all such things, as, being permanently fixed thereto, are known in law by the name of fixtures, and are considered as part and parcel of the fabric itself.

This distinction was once material, as it was formerly considered that although non-resident parishioners (*i.e.*, non-resident occupiers of land within the parish) were liable to contribute to a rate for the sustentation and repair of the fabric, they were not liable to contribute to a rate for supplying the necessaries for divine worship, and the movable goods and chattels of the church ; but they are now considered equally liable to contribute to both : at least, it is the practice to make but one rate for both purposes, and such general rate has frequently been upheld ; so that the same necessity does not exist as formerly for distinguishing these two classes of repairs.

With regard to the various goods and utensils of the church, which it is the duty of the churchwardens to provide from time to time, and to keep in good repair at the cost of the parish, it can scarcely be necessary to add anything to the observations which have been made in the preceding part of this chapter, where they have been already enumerated with sufficient certainty for all practical purposes.

It may not, however, be amiss to sum up the observations upon this part of the subject in the words of Dr.

Prideaux:—"What are not fixed to the freehold of the church, but are of the movable goods belonging thereto, are called the utensils of the church. These are such as either the law, or else the nature of the things themselves, makes necessary in every church, as the communion table with the carpet and linen covering belonging thereto, the chalice, paten, communion flagon, bible, common prayer book, the book of homilies, surplice, poor man's box, register book, &c., or else are added only for the more decent and better administration of divine offices, as a decent pulpit cloth, a pulpit cushion, a cloth for the reading desk, organs, silver basins for the offertory, branches for lights, candlesticks, and other such things as we find in some more wealthy parishes to be provided by the parishioners, over and above what either the law, or the absolute necessity of the things themselves, requires" (*a*).

By the *fabric* of the church is to be understood not only the fabric properly so called, but also whatsoever is permanently affixed to the freehold. It includes all such parts belonging thereto, as either the law, or else the nature of the things themselves, makes necessary in every church; and such are the walls, windows, doors, roof, floor, font, pulpit, reading-desk, seats, tower, &c.; to which, for greater ornament and decency, are added in many churches, paintings, altar-pieces, rails at the altars, &c. And for the benefit and conveniency of the parishioners, a clock, a dial, chimes, a superfluous number of bells, &c. (*b*).

The duty of the churchwardens, with reference to the repairs of the churchyard, is to see that it be kept in decent and fitting manner; that it be cleared of all rubbish, muck, thorns, briers, shrubs, and anything else that may annoy the parishioners when they come into it, or be any hindrance

(*a*) Prid. 35, 36. (*b*) Prid. 35.

to them in the burying of their dead, when there shall be any occasion for it; that no sinks or gutters be made through it, or anything else be there permitted which may be unbecoming the place, which is consecrated and set apart to be a repository for the bodies of the faithful, which were once the temples of the *Holy Ghost;* and that for the preservation of the said bodies, and the graves in which they lie, the said churchyard be well fenced (*a*).

They must also take care that the gates, stiles, and doors leading into the said churchyard be kept in due repair, for all these are part or appurtenances belonging thereto (*b*).

They are also to see that the churchways be well kept and repaired, and that no one do anything to obstruct or annoy the same, that so the parishioners may at all times without impediment or inconvenience resort to the church as often as any part of the divine service shall be there performed (*c*).

The said ways must be broad enough not only for the passage of single persons, but also for the carrying of a corpse through the same to be buried, as often as there shall be an occasion for it. And the stiles are to be so made that persons of all ages may well be enabled to go over them (*d*).

(*a*) Prid. 31. By prescripton the owner of adjoining land may be liable to repair those parts of the fences of the churchyard which adjoin his lands; and if he be sued for not repairing in the Ecclesiastical Court *Prohibition* goes. See *Churchwardens of Clayston and Duncombe;* 2 Roll. Abr. Prohibition 287.

(*b*) Prid. 32.

(*c*) Prid. 33. See also *Walter* v. *Montague and Lamprell,* 1 Curt. 253.

(*d*) Prid. 33. As to the power of the Crown to direct, by order in council, such acts to be done by the churchwardens, or such other persons as may have the care of any vaults or places of burial as may be necessary for preventing them from becoming dangerous or injurious to the public health, see 20 & 21 Vict. c. 81, s. 23; and as to the power of the church-

Another division as to the repairs of the church may be taken with reference to those things which are absolutely necessary for the sustentation of the fabric and the decent performance of divine service, and those which, though not absolutely necessary for such purposes, are highly becoming and fit to be provided, especially in the larger and more wealthy parishes ; but as the decision of the vestry hereon is binding upon the whole parish, alike in the one case and the other, it will not be necessary in this part of the work to treat specifically upon the subject.

The foregoing observations are made with an immediate reference to *parochial* churches ; but the same repairs, including the incidental expenses necessary for the due performance of the divine offices of the church, should be provided by the churchwardens for ancient chapels of ease, and parochial chapels, and also for the various classes of churches and chapels built and endowed under the Church Building Acts, except that where such churches or chapels, whether of ancient or modern foundation, are not entitled to the parochial rites of baptism, marrying, and burial, or any of them, it cannot of course be necessary to provide those articles which are specifically and exclusively applicable to the due celebration of such parochial rites respectively.

The repairs of ancient chapels of ease and parochial chapels are to be made by rates on the landholders (*e*)

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wardens to act, where persons having the care of such places neglect to comply with the order in council, see 22 Vict. c. 1, s. 1 ; and that the Act does not apply to places which had ceased to be used as burial grounds at the time of the passing of the first-named Act, and had not been by consecration or otherwise appropriated to the burial of the dead, see *Foster* v. *Dodd and another*, 35 L. J. (N. S.) Q. B. 6; 1 Q. B. 475, L. R. S. C., affirmed in error, 3 Q. B. 67 L. R.

(*e*) *Id. est, occupiers* of land.

within the chapelry, in the same manner as the repairs of the parish church (*a*).

But this must be intended of ancient chapels, and where this course hath been used ; for if there be land given for the repair of them, or any land or estate charged by prescription with the repairs of them, then the custom must be observed (*b*).

There is no express provision for regulating the repairs of *separate parishes* for ecclesiastical purposes under the Church Building Acts ; but the fair and necessary construction of these Acts leads to the conclusion, that each separate and distinct parish (including the curtailed parish) is upon the true construction of these Acts to bear its own rates and repair its own church. This is clearly assumed, though not expressly enacted, in sects. 70, 71, of 58 Geo. 3, c. 45 (*c*).

These sections, which regulated *inter alia*, the repairs of *district* parish churches, are as follow :—

Sect. 70. "The repairs of all district churches and chapels shall be made by the district to which they respectively belong by rates to be raised within the district, in like manner as in case of repairs of churches by parishes, and every such district shall be deemed in law *a separate and distinct parish for that purpose*, and the repairs of all chapels not made district churches shall be made by the parish in or for which the chapels shall be built."

Sect. 71. "Every such district shall remain nevertheless subject for twenty years, to be accounted from the day upon which the district church or chapel shall be consecrated, to the repair of the original parish church, and be

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(*a*) Gibbs. 209.

(*b*) Dagge, Part I. c. 12.

(*c*) See *Varty and Mopsey* v. *Nunn*, 2 Curt. 877 ; 1 N. E. C. 191, S. C. And see 1 & 2 Will. 4, c. 38, ss. 23, 25.

deemed part of the original parish for all purposes of such repairs, and the making and levying of rates for that purpose (*d*), and from and after the expiration of such twenty years the parish church shall be repaired by the district of the parish left as belonging to it, after the other divisions of districts are made ; and each district shall for ever thereafter make, raise, levy, collect, and apply separate and distinct rates for repairs of the church or churches, or chapels of the district, *as if a separate parish* (*e*).

Although the sections of 58 Geo. 3, above cited (*f*), speak of district churches and *chapels*, it must be remembered that by this expression is meant the churches or chapels of district *parishes ;* no power is given by that Act of creating district *chapelries*, as distinguished from district *parishes.* Such district chapelries have their origin under 59 Geo. 3, c. 134, and subsequent Acts, and the doubts arising as to their repairs seem in part to have led to the following enactment of 3 Geo. 4, c. 72, s. 20, for regulating the repairs of chapels, either with or without districts, built and appropriated under these Acts :—

"Whereas doubts may arise as to the repairs of churches or chapels acquired and appropriated, or built or enlarged, or improved in aid of the churches of parishes or places, under the provisions of the 58 & 59 Geo. 3, and this Act ; for remedy and prevention thereof be it enacted, that all chapels acquired and appropriated, or built, or enlarged and improved under any of the provisions of the said

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(*d*) But see the 6th sect. of the "Compulsory Church Rate Abolition Act, 1868," by which the first part of sect. 71 of 58 Geo. 3, c. 45, is impliedly repealed.

(*e*) As to the effect of the 14th sect. of "the new Parishes Act, 1856" (19 & 20 Vict. c. 104), on the 70th and 71st sections of 5 Geo. 3, c. 45, see the observation of Dr *Lushington* in *Gough* v. *Cartwright and Jones*, 9 Jur. 82 ; 7 L. T. (N. S.) 566.

(*f*) Sects. 70, 71.

recited Act, or under any local Acts, in cases in which no provision is made relating thereto in any local Acts in aid of the churches of the parishes or places in which they shall be situated (whether any districts of any such parishes shall have been assigned or not to such chapels as belonging thereto for ecclesiastical purposes), shall be repaired by the respective parishes and places at large to which such chapels shall belong, and rates shall be raised, levied and collected for that purpose in like manner in every respect as for the repairs of the churches of such parishes and places, and all the laws in force for making, raising, levying, and collecting rates for the repair of churches, shall be applied and put in force for the raising, making, levying and collecting such rates for the repair of such chapels, as fully and effectually to all intents and purposes as if the same were severally, separately, and specially repeated and re-enacted in this Act for that purpose as to the repairs of such chapels."

The repairs of subscription chapels built and appropriated under 5 Geo. 4, c. 103, are to be provided for by means of a repair fund arising out of pew rents (*a*), aided in some cases by the surplus proceeds out of the sale of vaults and burial places (*b*); those of chapels built and appropriated under 1 & 2 Will. 4, c. 38, and 3 & 4 Vict. c. 60, by means of a repair fund, consisting of one sum equal in amount to five pounds upon every one hundred pounds of the original cost of erecting and fitting up, or of purchasing such chapel or building to be secured upon money in the funds, or upon lands (*c*), which may be by way of perpetual rentcharge (*d*), and also a further sum to

(*a*) 3 Geo. 4, c. 72, s. 10.
(*b*) Sect. 15.
(*c*) 1 & 2 Will. 4, c. 38, s. 2.
(*d*) 3 & 4 Vict. c. 60. s. 15.

be reserved annually out of the pew rents of the said chapel after the rate of five pounds for every one hundred pounds of the sum so to be provided as last aforesaid (*e*); whilst the repairs of churches endowed by any body or person under 14 & 15 Vict. c. 97, are to be effected by a permanent provision by way of endowment and for the purposes of a repair fund, consisting of all or any of the following descriptions of property, namely land, tithes, rentcharges, or other tenements or hereditaments, money charged on land or invested in the funds—such endowment and repair fund to be exclusive of and in addition to the pew rents (if any) of such churches (*f*).

And lastly, it is conceived that new parishes, under 6 & 7 Vict. c. 37, 7 & 8 Vict. c. 94, and 19 & 20 Vict. c. 104, are upon the true construction and effect of these Acts, and irrespective of the provisions of the "Compulsory Church Rate Abolition Act, 1868" (*g*), repairable by rates upon such new parishes; for it is provided by the 15th section of the first-named Act, that every new parish under that Act shall be and be deemed to be a new parish for ecclesiastical purposes, and by the 17th section, that the churchwardens of such new parishes shall do all things pertaining to the office of churchwarden as to ecclesiastical matters in the said new parish. And by sect. 15 of 19 & 20 Vict. c. 104, it is enacted, that the incumbent of every new parish created or to be created under these Acts shall, saving the rights of the bishop of the diocese, have sole and exclusive cure of souls and the exclusive right of performing all ecclesiastical offices within the limits of the same for the resident inhabitants therein,

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(*e*) 1 & 2 Will. 4, c. 38, s. 2.
(*f*) See 14 & 15 Vict. c. 97, ss. 7, 8.
(*g*) 31 & 32 Vict. c. 109.

who shall for all ecclesiastical purposes be parishioners thereof and of no other parish, and such new parish shall, for the like puposes, have and possess all and the same rights and privileges, and be affected with such and the same liabilities as are incident or belong to a distinct and separate parish, and to no other liabilities: provided always, that nothing herein contained shall be taken to affect the legal liabilities of any parish regulated by a local Act of parliament, or the security for any loan of money legally borrowed under any Act of parliament or otherwise.

Indeed this may now be considered as settled by the recent case in the Court of *Arches* of *Gough and Cartwright* v. *Jones* (*a*), in which it was ruled that new parishes are not liable to contribute to the rate for the mother churches—that they are made parishes for ecclesiastical purposes, and that church rates fall within the description of ecclesiastical purposes; and by the subsequent case in the *Arches Court* of *Tiark and Fenning* v. *Hutton* (*b*), in which an objection that a new parish was not liable to repair its own church by a rate upon such new parish was abandoned at the hearing.

But all doubt as to the proper districts upon which the rates for the repairs of the churches of ecclesiastical districts are to be made has been removed by the sixth section of the "Compulsory Church Rate Abolition Act, 1868 (*c*)," by which it is enacted, that "whensoever any ecclesiastical district having within its limits a consecrated church in use for the purposes of divine worship shall have been legally constituted out of any parish or parishes,

(*a*) 9 Jur. 82; 7 L. T. (N.S.) 566; affirmed on appeal; *Jones*, app., *Gough and others*, resps., 3 Moore, P. C. (N. S.) 1.
(*b*) 35 L. J. (N. S.) Eccl. 11; 1 Eccl. 270 L. R.
(*c*) 31 & 32 Vict. c. 109.

and whether any such district shall or shall not be a separate and distinct parish, the inhabitants of such district shall not be entitled to vote for or in reference to a church rate or the expenditure thereof at any vestry meeting of the parish or parishes out of which the said district is formed, nor shall they be assessed to any rate made in relation to the parish church of the said parish or parishes, but such inhabitants may assemble in vestry, and subject to the provisions of this Act, may make and assess a rate in relation to the church of their own district in like manner as if such church were the church of an ancient parish."

The effect of this section is to make all such ecclesiastical districts for all purposes of church rates at common law separate and distinct parishes, entirely independent of the mother parish.

It should, moreover, be observed, with respect to new parishes, whose districts shall have been assigned after the passing of 19 & 20 Vict. c. 104, that the Ecclesiastical Commissioners for *England*, if it shall appear to them that sufficient funds cannot be provided from other sources, but not otherwise, may, with the consent of the bishop, by an instrument in writing under their common seal, order and declare that annual rents shall be charged and taken in respect of any of the pews or sittings in the church to which such district shall have been assigned, and the proceeds thereof not otherwise appropriated by law, be applied towards the repair and maintenance of the church, and the maintenance of the minister, and the services thereof, and the endowment of the church, in such manner as shall be specified in such instrument (*d*).

(*d*) Sect. 6; see also sect. 7. These sections are given in *extenso*, *post*, cap. 4, s. 1.

Before entering in detail upon the consideration of the proper steps to be taken for the purpose of legally effecting these repairs, it will be well to observe that the churchwardens, by ordering the repairs to be done, render themselves personally liable to the parties with whom they contract (*a*) ; and if the repairs are effected by the direction of one churchwarden alone, he will be solely liable, and will not be entitled to contribution from his co-churchwarden, for a churchwarden has no implied authority in law to pledge the credit of his co-churchwarden (*b*).

It may also not be amiss to observe here that a churchwarden has no lien on the parish books for moneys expended by him for the use of the parish (*c*).

The churchwardens should also remember, that if they accept a bill of exchange, or make a promissory note, even though it purport upon the face of it to be made by them as churchwardens (*d*), or if they enter into a bond conditioned for the payment of money, although by direction of the vestry, and with an express understanding evidenced by a resolution of vestry and part performance by them, that the claim shall be satisfied by the parish (*e*), or if they covenant as churchwardens for themselves and their successors to pay money, with an express proviso that they shall not be personally liable (*f*), they will, notwithstanding these precautions, in every one of these cases render themselves personally liable. And if the instru-

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(*a*) *Shaw* v. *Hislop*, 4 D. & R. 241 ; *Lancaster* v. *Tricker*, 1 Bing. 201 ; and see *Chambers* v. *Jones and another*, 5 Ex. 229. *Marsh* v. *Davies*, 1 Ex. 686.

(*b*) *Northwaite* v. *Bennett*, 2 C. & M. 316 ; 4 Tyr. 236, S. C.

(*c*) *Moss* v. *Thorniley*, 27 L. T. 101.

(*d*) *Rew* v. *Pettett*, 1 A. & E. 196.

(*e*) *Jacquet* v. *Lewis*, 8 Sim. 480.

(*f*) *Furnival* v. *Coombes*, 5 M. & G. 736 ; 6 Scott, N. R. 522, S. C.

ment purport to be made for themselves and their successors, it will constitute their successors their agents for the payment of the money, and a part payment by such successors will take the case out of the statute of limitations (*g*).

SECTION II.

On the Compulsory Church Rate Abolition Act, 1868.

Before proceeding to point out the proper steps to be taken by the churchwardens for the purpose of effecting the repairs of the church, it may be well to set out at length the important, and to all churchwardens who desire to discharge their duties faithfully, most embarrassing statute, which came into operation on the 31st day of August, 1868, for the Abolition of Compulsory Church Rates (*h*). The statute is in the following words :—

WHEREAS church rates have for some years ceased to be made or collected in many parishes by reason of the opposition thereto, and in many other parishes where church rates have been made the levying thereof has given rise to litigation and ill-feeling :

And whereas it is expedient that the power to compel payment of church rates by any legal process should be abolished :

(*g*) *Jones* v. *Evans*, 19 L. J., Exch., 200. As to the personal liability of churchwardens to the payment of sums of money directed by statute to be assessed on the churchwardens, see *Hopkinson* v. *Puncher*, 3 Ex. 95 ; *Mills* v. *Rydon*, 10 Ex. 67. That they are not, however, personally liable for visitation fees, notwithstanding the statute 30 & 31 Vict. c. 135, and a custom to pay them, see *Veley* v. *Pertwee and another*, 5 Q. B. 573 L. R. ; 39 L. J. Q. B. 195.

(*h*) 31 & 32 Vict. c. 109.

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows :—

1. From and after the passing of this Act no suit shall be instituted or proceeding taken in any ecclesiastical or other court, or before any justice or magistrate, to enforce or compel the payment of any church rate made in any parish or place in England or Wales.

2. Where in pursuance of any general or local Act any rate may be made and levied which is applicable partly to ecclesiastical purposes and partly to other purposes, such rate shall be made, levied, and applied for such last-mentioned purposes only, and so far as it is applicable to such purposes shall be deemed to be a separate rate, and not a church rate, and shall not be affected by this Act.

Where in pursuance of any Act of parliament a mixed fund, arising partly from rates affected by this Act and partly from other sources, is directed to be applied to purposes some of which are ecclesiastical purposes, the portion of such fund which is derived from such other sources shall be henceforth primarily applicable to such of the said purposes as are ecclesiastical.

3. In any parish where a sum of money is at the time of the passing of this Act due on the security of church rates, or of rates in the nature of church rates, to be made or levied in such parish under the provisions of any Act of parliament, or where any money in the name of church rate is ordered to be raised under any such provisions, such rates may still be made and levied, and the payment thereof enforced by process of law, pursuant to such provisions, for the purpose of paying off the money so due, or paying the money so ordered to be raised, and the costs incidental

thereto, but not otherwise, until the same shall have been liquidated : provided, that the accounts of the churchwardens of such parish in reference to the receipt and expenditure of the moneys levied under such Acts shall be audited annually by the auditor of the poor law union within whose district such parish shall be situate, unless another mode of audit is provided by Act of parliament.

4. Any church rate, or rate in the nature of church rate, made at any time before the passing of this Act may be collected and recovered in the same way as if this Act had not been passed.

5. This Act shall not affect any enactment in any private or local Act of parliament under the authority of which church rates may be made or levied in lieu of, or in consideration of the extinguishment or of the appropriation to any other purpose of, any tithes, customary payments, or other property or charge upon property, which tithes, payments, property, or charge, previously to the passing of such Act had been appropriated by law to ecclesiastical purposes as defined by this Act, or in consideration of the abolition of tithes in any place, or upon any contract made, or for good or valuable consideration given, and every such enactment shall continue in force in the same manner as if this Act had not passed.

6. This Act shall not affect vestries, or the making, assessing, receiving, or otherwise dealing with any church rate, save in so far as relates to the recovery thereof ; but, subject to the provisions hereinbefore contained, whensoever any ecclesiastical district having within its limits a consecrated church in use for the purposes of divine worship shall have been legally constituted out of any parish or parishes, and whether such district shall or shall not be a separate and distinct parish, the inhabitants of such district shall not be entitled to vote for or in reference to a church rate

or the expenditure thereof at any vestry meeting of the parish or parishes out of which the said district is formed, nor shall they be assessed to any rate made in relation to the parish church of the said parish or parishes, but such inhabitants may assemble in vestry, and, subject to the provisions of this Act, may make and assess a rate in relation to the church of their own district in like manner as if such church were the church of an ancient parish : provided that nothing in this Act contained shall affect any right of burial to which the inhabitants of the district may be entitled in the churchyard of the mother church.

7. It shall be lawful for all bodies corporate, trustees, guardians, and committees who or whose *cestui-que trust* are in the occupation of any lands, houses, or tenements to pay, if they think fit, any church rate made in respect of such property, although the payment of the same may not be enforceable after the passing of this Act, and the same shall be allowed to them in any accounts to be rendered by them respectively.

8. No person who makes default in paying the amount of a church rate for which he is rated shall be entitled to inquire into, or object to, or vote in respect of the expenditure of the moneys arising from such church rate ; and if the occupier of any premises shall make default for one month after demand in payment of any church rate for which he is rated, the owner shall be entitled to pay the same, and shall thereupon be entitled, until the next succeeding church rate is made, to stand for all purposes relating to church rates (including the attending at vestries and voting thereat) in the place in which such occupier would have stood.

9. A body of trustees may be appointed in any parish for the purpose of accepting, by bequest, donation, contract, or otherwise, and of holding any contributions

which may be given to them for ecclesiastical purposes in the parish.

The trustees shall consist of the incumbent and of two householders or owners or occupiers of land in the parish, to be chosen in the first instance, and also from time to time on any vacancy in the office by death, incapacity, or resignation, one by the patron, and the other by the bishop of the diocese in which the parish is situate.

The trustee shall be a body corporate by the name of the church trustees of the parish to which they belong, having a perpetual succession and a common seal, with power to sue and be sued in their corporate name.

The trustees may from time to time, as circumstances may require, pay over to the churchwardens, to be applied by them either to the general ecclesiastical purposes of the parish, or to any specific ecclesiastical purposes of the parish, any funds in their hands, and the funds so paid over may be applied to such purposes and shall not be applied to any other purpose : provided always, that no power shall be thereby conferred on the churchwardens to take order with regard to the ecclesiastical purposes of the parish further or otherwise than they are now by law entitled to do : provided also, that due regard shall be had to the directions of the donors of funds contributed for any special ecclesiastical purposes ; and, subject as aforesaid,

The trustees may invest in government or real securities any funds in their hands, and accumulate the income thereof, or otherwise deal with such funds as they think expedient, subject to the provisions of this Act.

The incumbent shall be the chairman of the trustees.

The trustees shall once at the least in every year lay before the vestry an account of their receipts and expenditure during the preceding year, and of the mode in which

such receipts have been derived and expenditure incurred, together with a statement of the amount, if any, of funds remaining in their hands at the date of such account.

10. In this Act "ecclesiastical purposes" shall mean the building, rebuilding, enlargement, and repair of any church or chapel, and any purpose to which by common or ecclesiastical law a church rate is applicable or any of such purposes :

"Church rate" shall mean any rate for ecclesiastical purposes as hereinbefore defined :

"Parish" shall mean any parish, ecclesiastical district, chapelry or place within the limits of which any person has the exclusive cure of souls.

11. This Act may be cited as the "Compulsory Church Rate Abolition Act, 1868."

The main objects of the statute are these :—

1. The abolition of the right to recover church rates by legal process. Sect. 1.

2. The application of statutable rates which under the provisions of the statutes would be applicable partly to church rate purposes, and partly to other purposes, to such last-named purposes only. Sect. 2.

3. The primary application to church rate purposes of such portions of mixed funds, arising partly from rates affected by the Act, and partly from other sources, as are derived from such other sources. *Ibid.*

4. The reservation of the right to levy by compulsory rates money due under the provisions of any statute on the security of church rates, and rates in the nature of church rates, or ordered to be raised in the name of church rate under any such provisions, at the time of the passing of the Act. Sect. 3.

5. The collection and recovery of church rates made

before the passing of the Act, as if it had not passed. Sect. 4.

6. The reservation in full effect of enactments in private and local Acts authorizing the making or levying of rates in lieu of tithes, customary payments, or other property previously appropriated by law to "ecclesiastical purposes," or in consideration of the abolition of tithes, or upon any contract made, or for good or valuable consideration. Sect. 5.

A case involving the construction and effect of this section was brought before the Court of *Queen's Bench* in Michaelmas, 1870 (*a*). It was an application by a parishioner of St. Saviour's, Southwark, for a writ of *certiorari* to to bring up, for the purpose of quashing it, an order of certain justices for a warrant of distress to enforce payment of the sum assessed upon him in respect of a rate made for the maintenance of the ministers of the parish, the repair of the parish church, and other purposes, under the authority of a local Act, 56 Geo 3, c. lv. The Act was intituled "An Act to enlarge the Powers of an Act passed in the 22nd and 23rd Years of the Reign of His Majesty King Charles the Second, for making the Manor of Paris Garden a Parish, and to enable Parishioners of Saint Saviour's, Southwark, to raise a Maintenance for their ministers, and for Repair of their Church, and for other Purposes relating thereto." It recited the Act of Charles II., which last-named Act, after reciting that by letters patent of James I., the rectory had been granted to certain persons and their heirs in trust for the wardens of the said parish and their successors for the purposes above mentioned, and that the revenue of the rectory was not sufficient for those purposes,

(*a*) Ex parte *Stafford*, Q. B. M. T. 1870. A note of the case was kindly furnished to the author by the late Mr. *Risdon D. Bennett*, one of the counsel engaged in it.

enacted that the parishioners should for ever thereafter be exonerated, acquitted, and discharged from all tithes, and that their messuages, &c., should be held tithe-free, and that in consideration thereof it should be lawful for the church-wardens and overseers to make and levy annually a tax, not exceeding, &c., to be appropriated to the same purposes. The statute of Geo. 3 in effect merely increased the amount for which the rate might be made, and the stipends of the ministers. It was objected, that as the rate had been made since the passing of the Compulsory Church Rate Abolition Act, and was made and purported on the face of it to be made for "ecclesiastical purposes," the proceedings were rendered illegal by sects. 1 and 2 of that Act; but the Court held that the case came within the 5th clause of the Act, and refused the rule for a *certiorari*.

It is believed that there are in London and its neighbourhood, and in other of the more populous parts of the country, many cases analogous to that of St. Saviour's, Southwark, and there is every reason to hope that the 5th section of the Act will prove of great practical utility.

7. The preservation of the right of vestries, and of the right of making, assessing, receiving, and otherwise dealing with church rates, except so far as relates to the recovery of them. Sect. 6.

8. The constituting every ecclesiastical district with a consecrated church in effect a separate and independent parish for church rate purposes. *Ibid.*

9. The conferring upon bodies corporate, trustees, &c., the right to pay the church rate, if they think fit, whether they or their *cestui-que trust* be in occupation, and to have the amounts allowed in their accounts. Sect. 7.

10. The regulation of the disqualifications of occupiers making default in the payment of church rates, and of the rights of the owners by reason of such default, respectively. Sect. 8.

11. The establishment of "church trustees," and the regulation of their functions, rights, and duties. Sect. 9.

12. The interpretation of the words "ecclesiastical purposes, "church rate," and "parish." Sect. 10.

This statute, therefore, has practically a very important bearing on the making and collecting of church rates in two respects; *first*, by depriving the churchwardens (except in the cases therein excepted) of the power to recover church rates by legal process ;—a mischief which it attempts to remedy, and which it may be hoped it has to some extent remedied, by providing for the establishment of "church trustees," in whom property for the repair of the church may be vested, by enabling certain parties to pay the rate as if it were a legal charge which they were bound to satisfy, who, but for the enabling clause, might not be entitled to do so, and by visiting defaulting occupiers with certain disabilities, and conferring on the owners of the property in respect of which the default has been made certain rights and privileges on payment of the rates by them. And, *secondly*, by rendering every ecclesiastical district having within its limits a consecrated church so far as regards the making and collecting of church rates entirely independent of the mother parish ; —a result which may also, perhaps, to some extent, have the effect of lessening the mischief produced by the main provision of the Act, for there can be no doubt that the liability of the inhabitants of the district in certain cases to contribute to the rate of the mother parish caused considerable discontent, and not unfrequently aroused feelings of hostility against church rates, even in persons who were not otherwise disposed to regard them unfavourably.

But the statute does not make church rates illegal ; on the contrary, it expressly recognizes them, and contemplates their continuance as a principal means for providing for the repair of churches ; nor does it in any way narrow the purposes for which a church rate may be made, although

it defines those purposes by its interpretation of the words "ecclesiastical purposes," and "church rate." Nor does it relieve the parishioners from the duty of repairing their church, or the churchwardens from the duty of effecting these repairs. The churchwardens were never bound to effect these repairs if they could not procure the necessary funds; but if they can procure them, they are as much bound to effect the repairs now as they were before the passing of the "Compulsory Church Rate Abolition Act, 1868;" and if they cannot otherwise obtain them, it will be still their duty to endeavour to do so by means of a church rate.

SECTION III.

On the first steps to be taken by the Churchwardens for the purpose of effecting the necessary Repairs; of calling a Vestry; with some observations on Vestries generally.

As the providing for and effecting the repairs of the church is one of the most important duties which the law throws upon the churchwardens, they should lose no time in taking the necessary steps for enabling them to discharge it with effect.

The current expenses for the year should, of course, in all cases be provided, and the churchwardens are, in justice, equally bound to effect the requisite repairs, however slight, and trifling they may be: for the practice, unfortunately but too common, of leaving this to be done in a future year, is most reprehensible and unjust, as it must ultimately increase the expense of the repairs, and throw on the parishioners of a future period a burden which ought to be borne by the parishioners of the current year.

With the view of effecting this object, it is the duty of the churchwardens, as soon as they are admitted into office

to ascertain, as nearly as possible, the current expenses of the year, and it is very desirable also to avail themselves of the assistance of at least one competent surveyor, in order that the church, churchyard, and utensils may be surveyed, that the necessary repairs may be ascertained, and an estimate made of the probable costs and expenses attending them.

When the survey and estimate have been duly made, a vestry should be forthwith convened, for the purpose of submitting the proposed repairs to their consideration, and of obtaining, if there be no sufficient funds otherwise applicable to the purpose (*a*), the necessary rate.

If a rate be required, the meeting of the vestry is absolutely necessary, for the rate must be made by the parishioners in vestry assembled (*b*), and even where the churchwardens have already ample funds at their command, a vestry meeting ought to be called, if the contemplated repairs are of an important character, and have not already received the express sanction of the parishioners.

It will be advisable, therefore, in this place not merely with reference to church rates, but also with reference to the election of the parishioners' churchwardens, to consider with some attention the nature and functions of vestries.

(*a*) That funds which have always been appropriated to the repair of the old parish church will, in the absence of evidence to the contrary, be deemed to have been given specifically for that purpose, and will not, in the event of the parish being divided, be apportionable between the old parish church and the church of the new parish, see Re *Church Estate Charity, Wandsworth*, 23 L. T. (N. S.) 293; 6 Ch. Ap., 297 (n.), 2 L. R. Affirmed, on appeal, by the Lords Justices: 6 Ch. Ap., 296 L. R.

(*b*) *Burder* v. *Veley*, 12 A. & E. 233; *Veley* v. *Burder* 12 A. & E, 265; *Gosling* v. *Veley*, Dom. Boc. That a minority of the vestry cannot grant the rate, even for *necessary* repairs, where the majority have refused it. See *Gosling* v. *Veley and Joslin*, 4 H. of L. Cas. 679.

A vestry, properly speaking, is the assembly of the whole parish, met together in some convenient place for the dispatch of the affairs and business of the parish (*a*) ; and this meeting being commonly held in the vestry adjoining to or belonging to the church, it thence takes the name of *vestry*, as the place itself doth from the minister's *vestments*, which are usually deposited and kept there (*b*).

It is not, however, essential to the validity of the meeting that it should be held in the *vestry* of the church (*c*). It may be convened in the church itself (*d*), or in any other place in the parish, provided the parishioners have free access to it, even though the place fixed on be *private* property (*e*).

Where the population of a parish exceeds two thousand persons, according to the then last preceding census, the Poor Law Commissioners may, upon the application in writing, of the churchwardens, made pursuant to a resolution of the vestry of such parish, make an order under their seal of office, that the recent Act for preventing the holding of vestry or other meetings in churches, and for regulating the appointment of vestry clerks (*f*), shall be applied to and be put in force within such parish (*g*). And after the expiration of twelve months from the making and

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(*a*) Shaw's Par. Law, c. 17; and see *White* v. *Steel*, 12 C. B. (N. S.) 383. In that case the Court said, "we know of no legal mode of ascertaining the desire of a parish but by convening a vestry, and duly conducting the proceedings therein to their legal termination."

(*b*) Shaw's Par. Law, c. 17.

(*c*) Steer's Par. Law, 251; Tyrwhitt's Prid. 180.

(*d*) Steer's Par. Law, 251.

(*e*) *R.* v. *Rector and Churchwardens of Birmingham*, 7 A. & E. 254; *Baker* v. *Wood*, 1 Curt. 527.

(*f*) 13 & 14 Vict. c. 57. See this Act at length in the Appendix.

(*g*) Sect. 1.

publishing of such order, no vestry meeting can be held in the church, nor, except in case of urgency, and with the previous approval of the said commissioners, in the vestry room attached to such church (*h*).

The proceedings of parish vestries are at present regulated by certain Acts of parliament, the enactments of which will be explained in the course of the work, and the Acts of parliament themselves added in an Appendix, in order to make this important part of the treatise as useful as possible (*i*).

The next step to be taken by the churchwardens is to affix the necessary notices at all churches and chapels within their parish, for the purpose of summoning the inhabitants together, and apprising them of the object for which the meeting is to be called.

According to the old authorities, such notice ought, at common law, to have been given publicly on the *Sunday* before the meeting was to be held, either in the church after divine service was ended, or else at the door as the parishioners came out (*k*); but now it is provided by 58 Geo. 3, c. 69, s. 1, that from and after the 1st day of July, 1818, no vestry or meeting of the inhabitants in vestry, of or for any parish, shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and of the special purpose thereof, three days at the least (*l*) before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel on some Sunday,

(*h*) 13 & 14 Vict. c. 57, s. 2.

(*i*) See 58 Geo. 3, c. 69; 59 Geo. 3, c. 85; 7 Will. 4 and 1 Vict. c. 45; 13 & 14 Vict. c, 57; 32 & 33 Vict. c. 41, ss. 7, 8, 19.

(*k*) Wats. c. 33.

(*l*) For the meaning of the words "three days *at the least*" *vide post*, p. 101, note (b).

during, or immediately after, divine service, and by affixing the same on the principal door of such church or chapel.

This enactment is somewhat modified by 7 Will. 4 and 1 Vict. c. 45, s. 2, by which it is enacted, "that all proclamations or notices which, under or by virtue of any law or statute, or by custom or otherwise, have been heretofore made or given in churches or chapels, during or after divine service, shall be reduced into writing, and copies thereof, either in writing or in print, or partly in writing and partly in print, shall, previously to the commencement of divine service, on the several days on which such proclamations or notices have heretofore been made or given in the church or chapel of any parish or place, or at the door of any church or chapel, be affixed on or near the doors of *all the churches and chapels* within such parish or place, and such notices when so affixed, shall be in lieu of, and as a substitution for, the several proclamations and notices so heretofore given as aforesaid, and shall be good, valid, and effectual to all intents and purposes whatsoever. And by sect. 3, it is enacted, "that no such notice of holding a vestry shall be affixed to the principal door of such church or chapel, unless the same shall previously have been signed by a churchwarden of the church or chapel, or by the rector, vicar, or perpetual curate of such parish, or by an overseer of the poor of such parish; but that every such notice so signed shall be affixed on or near the principal door of such church or chapel."

So that the present course is for the churchwardens to reduce into writing a notice, setting out the *place*, *day*, *hour*, and *special purpose*, for which the meeting is to be held, and to cause copies of such notice, either in writing or in print, or partly in writing and partly in print, signed by one of the churchwardens or by the minister of the

parish (*a*) to be affixed previously to the commencement of divine service on Sunday (taking care that the said Sunday be three days at the least (*b*) before the day to be appointed for holding such vestry), at or near the doors of all the churches and chapels within their parish ; but it is to be observed that the requirements of the statute will be sufficiently satisfied by affixing the notice to the *principal* door of each church and chapel (*c*) ; and also, that it is not necessary to affix it at all to Roman Catholic or Dissenting meeting-houses (*d*), nor to a school-room used for the celebration of divine service according to the rites of the Church of England (*d*), nor, it is presumed, to Church of England proprietary or private chapels (*e*).

(*a*) As to the validity of such a notice (for ecclesiastical purposes), signed by an overseer of the poor, see *Butt* v. *Fellowes*, 3 Curt. 680; and see *post*, pp. 105, 109.

(*b*) By the words "three days *at the least*," are to be understood three clear days, exclusive of the day of giving the notice, and of the day on which the vestry is to be held ; so that if the vestry is to be held on any day of the week earlier than Thursday, the notice must be given on the Sunday week preceding. See *R.* v. *Salop JJ.*, 2 N. & P. 286; 6 Dow. P. C. 28, S. C.; *Newton* v. *The Town Clerk of Salisbury*, 4 C. B. 32; *Adey* v. *Hill*, 4 C. B. 38; *The Queen* v. *Geo. Best and others*, 2 New. Sess. Cas. 655 ; 2 Bail Court Rep. 90.

(*c*) *Ormerod and others* v. *Chadwick and another*, 16 M. & W. 367; 16 L. J. (M. C.) 143, S. C. The notice must be affixed to each of such churches and chapels, however recently they may have been respectively built : *R* v. *Whipp*, 4. Q. B. 141. But it need not be affixed to the door of an old church or chapel in which divine service has ceased *de facto* to be celebrated, although burials and christenings are occasionally celebrated there, and parochial meetings are occasionally held there : *Ormerod and others* v. *Chadwick and another*, supra. And where the rate affects a district only, it will be sufficient to affix the notice on the door of the church or chapel belonging to that particular district : *R.* v. *Marriott*, 12 A. & E. 779.

(*d*) *Ormerod and others* v. *Chadwick and another*, supra.

(*e*) In *Ormerod and others* v. *Chadwick and another*, supra, the court expressed an opinion that it was not necessary to affix the

It is to be further observed that it is not necessary that the notice should be affixed to the church door previously to the commencement of the morning service. It will be sufficient if this be done before the commencement of either of the usual services, whether morning, afternoon, or evening (*a*).

It must be particularly observed, that the *special purpose*, for which the vestry is to be called must be set forth in the notice. This is, of course, in order that the parishioners may be duly apprised of the object of the meeting; and the churchwardens must be careful that this requisite of the Act be complied with, and that the *purpose* be specified in the notice with sufficient certainty. No particular form of words, however, is necessary.

In framing this notice in ordinary cases for the purpose of taking into consideration the condition of the church and churchyard, and the necessity of levying a rate for the repairs thereof, no difficulty can arise (*b*); but when the contemplated object of the meeting is not merely the ordinary repairs of the church, but some special and

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notice to private or proprietary chapels, but it was unnecessary in that case to decide the point.

(*a*) *Burnelley* v. *The Overseers of Methley*, 1 E. & E. 789.

(*b*) The following form may be used:—

[*Name of the parish or chapelry.*]

The parishioners are requested to take notice that a vestry meeting will be held on —— day next, the —— day of —— at nine o'clock in the fore- [or *after*] *noon, at* [*the usual place of meeting within the parish*], *for the purpose of passing the accounts of the late churchwardens, and of making a rate or assessment for the repairs of the parish church for the present year, and for such other expenses as are by law chargeable on the church rate.*

Dated this —— day of ——.

(*Signed*) *A. B.* (*Minister.*) *or*
E. F.
G. H. } *Churchwardens.*

unusual purpose, as the making of a new gallery, the purchasing of an organ, or the like, the churchwardens cannot be too particular as to the form of their notice, for all the proceedings will be invalid if the notice be not sufficiently specific.

In *Blunt and another* v. *Harwood* (*c*), the validity of a notice of the purposes of a vestry meeting was the direct point under consideration. In that case, at a previous vestry meeting, which was admitted in all respects to have been regular, certain plans had been proposed for improving the parish church, and were referred to a committee. At a subsequent vestry, their report, recommending an enlargement, was received and adopted, and a resolution passed for borrowing money on the security of the parish rates, under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, to carry the plans into execution (*d*). The Defendant was libelled in the Ecclesiastical Court by the plaintiffs who were the churchwardens of the parish, for the non-payment of a church rate made in pursuance of a vote of the last-mentioned vestry. The defendant resisted payment on the ground that the notice of the purposes for which the vestry was called was not sufficiently *specific*.

The notice, as set out in the libel in the Ecclesiastical Court, stated "that a vestry was to be held in the vestry room of the said parish, on the 2nd day of August then next, at nine o'clock of the forenoon to receive the report of the committee appointed to consider the plans proposed to the vestry meeting held on the said 10th day of March for affording additional accommodation to the parishioners desirous of attending divine worship in the said parish church."

(*c*) 1 Curt. 649; 8 A. & E. 510.
(*d*) As to these Acts, see *post*, s. 5.

The learned judge of the *Arches Court*, Sir *Herbert Jenner Fust*, being of opinion that the notice was sufficiently specific, admitted the libel to proof and a *prohibition* was then moved for in the Court of *Queen's Bench*, to prohibit the Ecclesiastical Court from going on with the suit, upon the ground that the notice was *insufficient*.

The Court of *Queen's Bench* gave no decided opinion as to the validity of the notice, as in the course of the proceedings it became unnecessary for them to do so; but the opinion of the Court seemed to be against the sufficiency of the notice; and it is apprehended, both from the language of the learned judges in that case, and from the tenor of the decisions of the Court of *Queen's Bench* as to the requisites of notice of the grounds of appeal against the removal of a pauper, that the Court, if it had been necessary to determine the question, would have decided against the notice, and granted a *prohibition*.

The following form of notice was in the same case (*a*) held *sufficient* by the Court :—

"Streatham, 24th July, 1838.

"Notice is hereby given, that a vestry will be held in the vestry room of this parish, at nine o'clock precisely, to receive a report from the church committee, and *to adopt such measures as may appear necessary for carrying that report into execution;* and further, that it is intended that such vestry do adjourn to the workhouse of this parish, there to transact the business of the day.

"J. S. YATES, Vestry Clerk."

In the subsequent case of *Warner* v. *Gater* (*b*), the sufficiency of the notice of the vestry meeting was also

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(*a*) *Blunt and another* v. *Harwood*, 8 A. & E. 610; 3 N. & P. 577, S. C.

(*b*) 2 Curt. 315.

brought under the consideration of the Court of *Arches;* but in this case the notice, though quite general in its terms, was held sufficient by Sir *Herbert Jenner Fust*, upon the ground that it pointed out with sufficient certainty the general purposes for which the meeting was called. The rate had been made for defraying the expenses of the consecration of a church rebuilt under 59 Geo. 3, c. 134. The notice was "for making church rate and other purposes." "Certainly," said that learned judge, "there is no specification of the exact object or purposes to which the rate was to be applied ; but there is a notice that that meeting was to be for the making of a church rate, and it is hypercritical to say that every particular circumstance and object is to be stated in the notice." And in *Butt* v. *Fellowes* (*c*), Sir *Herbert Jenner Fust* decided that a notice of a vestry meeting "to elect a guardian and other officers," at which not only was a guardian of the poor appointed, but also other parochial officers, besides the churchwardens, was a valid notice for the election of churchwardens. He said he was of opinion that this was a legal notice, although it would have been more regular if the notice had been "to elect a guardian, a *churchwarden*, and other officers" (*d*).

Again, in a recent case before the *Judicial Committee* of the *Privy Council*, *Smith* v. *Deighton* (*e*), the sufficiency of the notice was the direct point under consideration, and this case is a strong authority to show that it is essential to the validity of the proceedings of the vestry that the notice should clearly point out the special purpose for which the vestry meeting is to be called. The notice in question

(*c*) 3 Curt. 680.

(*d*) *Sed quære*, whether such a notice could be sustained. It is apprehended that it could not, unless perhaps it appeared, as was the case in *Butt* v. *Fellowes*, that the notice was in accordance with the established and recognized practice of the parish.

(*e*) 8 Moore, P. C. 180.

stated that the vestry was to be held for the purpose of making a rate to defray the expenses of repairing and restoring the parish church, rendered necessary by reason of a late fire; or otherwise to consider the expediency of borrowing the amount of such expenses on the credit and security of the church rates, pursuant to the provisions of the 58 Geo. 3, c. 45, or of 59 Geo. 3, c. 134; and in case it should be considered expedient to borrow the amount of such expenses, to authorize the churchwardens to take the necessary proceedings for that purpose, and to do all matters incident thereto. At the meeting held in pursuance of such notice, it was resolved :—1st. That the churchwardens be authorized to borrow upon the security of the church rates, in payment of the expenses incurred in restoring the church, to be paid by annual instalments of not less than one-tenth of the loan, with interest: 2nd. That in payment of the first instalment of the loan and the ordinary expenses of the parish church, a rate should be granted to the churchwardens. In pursuance of this second resolution, a rate was made to pay the first instalment of the loan, and also for the necessary and incidental expenses of the church. It was held, reversing the judgment of the court below, that the rate was invalid, as the notice was insufficient and not in compliance with the provisions of 58 Geo. 3, c. 69, s. 1; for although there was sufficient authority by the notice for the first resolution, yet the notice was insufficient and fatal as to the second resolution for making a rate for the necessary and incidental repairs of the church.

But although it is necessary that the notice should give proper information of what is intended to be done at the meeting, and that the form of it should be such as not to mislead any one, it ought nevertheless to receive a reasonable construction; and if it gives fair and reasonable

warning to all parties entitled to be present for the purpose for which it is called, it will be held sufficient.

Thus, in the recent case of *Rand and another* v. *Green and another* (*a*), the following notice was held sufficient by the Court of *Queen's Bench*, and by the Court of *Common Pleas*:—"Notice is hereby given, the churchwardens, overseers, and other principal inhabitants of this parish are requested to meet in vestry on, &c., to examine the churchwardens' accounts, and to grant them a rate."

And in the still more recent case of *Gough and Cartwright* v. *Jones*, in the Court of *Arches* (*b*), where the notice of vestry was simply "for the purpose of granting a church rate for and towards the repair and expenses of the parish church," it was held sufficient, although the chief item in the estimate, being nearly two-thirds of the whole amount, was for completing some brooch windows with canopy heads and mullions. The windows had been commenced before the notice was given, which the learned judge said was an additional reason for holding the notice to be sufficient, as the parishioners could not have been taken by surprise (*c*).

It is very common in this notice to state, that in the event of a poll being demanded, the meeting will be adjourned to some other place (specified in the notice) for the purpose of taking the poll, and a poll taken at such place in pursuance of the terms of the notice is good and binding upon the parishioners, although the adjournment be made without taking the sense of the vestry upon the subject, for the adjournment in this particular event is part of the original appointment (*d*). Indeed, the chairman may, on his own

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(*a*) 9 C. B. (N. S.) 470; 30 L. J., C. P. 80 & 82 (n).
(*b*) 11 W. R. 107; 9 Jur. 82.
(*c*) See also *R.* v. *Evan Powell*, 8 Q. B., 403 L. R.
(*d*) *R.* v. *Archdeacon of Chester*, 1 A. & E. 342; *Blunt and another* v. *Harwood*, supra.

responsibility, adjourn the meeting, although no such notice be given (*a*).

Nor is any further notice necessary, although the adjournment be to a future day ; for in contemplation of law the adjourned meeting is a continuation of the original meeting (*b*) ; but if any business not comprised in the original notice is to be transacted at the adjourned meeting, notice of such new business must, of course, be duly given, for, so far as regards such new business, the meeting would be an original and not an adjourned meeting (*b*).

The fittest person to sign the notice of vestry is the minister, he being the head of the parish, and having a right to preside at the meeting (*c*). Vestries for church matters are, however, frequently called by the churchwardens, and this may lawfully and properly be done, and the notices of such meetings be signed by them, or one of them (*d*). Indeed, in *Dawe* v. *Williams* (*e*), it is said that vestries for church matters are regularly to be called by the churchwardens with the consent of the minister. But an overseer of the poor is obviously an unfit person to sign a notice of vestry meeting for church purposes, and it may be doubtful whether such a notice would be deemed valid in law, although Sir *Herbert Jenner Fust* was of opinion, in *Butt* v. *Fellowes* (*f*), that a notice signed by an overseer for the election of a guardian and other officers, including a churchwarden, was a valid notice for the election of a

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(*a*) *R.* v. *Churchwardens of St. Mary, Lambeth,* 1 A. & E. 146 (n); *R.* v. *D'Oyley, D. D.* 12 A. & E. 139; 4 P. & D. 52, S. C.

(*b*) *Lorant and another* v. *Scadding,* in error, 13 Q. B. 706; affirmed in Dom. Proc.; see *Scadding* v. *Lorant,* 3 H. of L. Cas., 418; 13 Jur. 955.

(*c*) *R.* v. *D'Oyley, D. D.,* 12 A. & E. 139 ; 4 P. & D. 52, S. C.

(*d*) See 7 Will. 4 and 1 Vict. c. 45, s. 3.

(*e*) 2 Add. 130.

(*f*) 3 Curt. 680.

churchwarden. With respect to a notice of vestry signed by any other parishioner alone, not being either minister, or churchwarden, or overseer, it is submitted, that the same would be absolutely void, for the third section of 7 Will. 4 and 1 Vict. c. 45, requires the notice to be signed by one of these parties before it is affixed to the church doors. Sir *Herbert Jenner Fust* is, however, reported to have said, in *Butt* v. *Fellowes* (*g*), that he was not prepared to say that even such a notice would be invalid.

The churchwardens should of course attend the vestry, but they attend only as parishioners, and have no right to *preside* at the meeting. This right is by law vested in the *minister* of the parish : for the minister is not a mere individual of vestry ; on the contrary, he is always described as the first, and an integral part of the parish, the form of citing a parish being "the minister, churchwardens, and parishioners" ; and that he and any other individual should be put in competition for the office of chairman, would be placing him in a degraded situation, in which he is not placed by the constitutional establishment of this country. In sound legal principle he is head and præses of the meeting (*h*).

But if the *rector*, *vicar*, or *perpetual curate* shall not be present, the churchwardens have not even then a right to preside, but the meeting shall proceed to elect a chairman by plurality of votes (*i*) ; and if any irregularity is committed in the election or nomination of a chairman, the objection must be taken at once, for if this is not done, it cannot be insisted on in any subsequent proceedings (*k*).

(*g*) 3 Curt. 680.
(*h*) *Wilson* v. *McMath*, 3 B. & A. 241 ; 3 Phil. 87 ; *R.* v. *D'Oyley, D. D.*, 12 A. & E. 139 ; 4 P. & D. 52, S. C.
(*i*) 58 Geo. 3, c. 69, s. 2.
(*k*) *Cornwall and Pain* v. *Woods*, 4 N. E. C. 555.

The chairman should of course be a ratepayer and member of the vestry, but if a person who is not a ratepayer is elected chairman, it seems that the proceedings before him would nevertheless be valid, unless they were carried by his own vote (*a*).

All inhabitants rated to the relief of the poor, whether *resident* inhabitants of the parish (*b*) or not (*c*), are, unless disqualified by non-payment of their rates in manner hereafter pointed out, entitled to attend the vestry and vote thereat; and this right is also extended to all inhabitants coming into the parish since the last rate for the relief of the poor, if they consent to be rated (*d*).

And by the 19th section of the "Poor Rate Assessment and Collection Act, 1869" (*e*), it is enacted, that the overseers in making out the poor rate shall in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column in the rate book the name of the occupier of every ratable hereditament, and such occupier *shall be deemed to be duly rated* for any qualification or franchise which as regards rating depends upon the payment of the poor rate;—with a proviso, that any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been omitted.

But by the 3rd section of 59 Geo. 3, c. 85, it is enacted that no person who shall have refused or neglected to pay

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(*a*) *R.* v. *Middlesex JJ.*, 22 L. J. (M. C.)
(*b*) 58 Geo. 3, c. 69, s. 2.
(*c*) 59 Geo. 3, c. 85, s. 1.
(*d*) 58 Geo. 3, c. 69, s. 4.
(*e*) 32 & 33 Vict. c. 41.

any rate for the relief of the poor which shall be due, and shall have been demanded of him, shall be entitled to vote or to be present in any vestry of the parish for which such rate shall have been made, until he shall have paid the same.

This enactment is, however, modified by 16 & 17 Vict. c. 65, which provides that from and after the passing that Act no person shall be required, in order to be entitled to vote, or to be present at any vestry meeting held under the provisions of 58 Geo. 3 and 59 Geo. 3, to have paid any rate for the relief of the poor of the parish in which such meeting shall be held, which shall have been made or become due within three calendar months immediately preceding such vestry meeting.

And it is further modified by the "Poor Rate Assessment and Collection Act, 1869 (*f*)," which repeals the Small Tenements Act 13 & 14 Vict. c. 99, and so much of any local statute as relates to the rating of owners instead of occupiers, so far as the same apply to any poor rate made after the 26th July, 1869 (*g*), — and where the ratable value of the hereditament does not exceed 20*l.* if situate in the metropolis (*h*), 13*l.* if situate in any parish wholly or partly within the borough of Liverpool, 10*l.* if situate in any parish wholly or partly within the city of Manchester or the borough of Birmingham, or 8*l.* if situate elsewhere, and provides that by order of the vestry (*i*), or in certain cases by agreement in writing between the owners and the overseers (*k*), for the payment of the poor rate shall be made by the owner instead of the occupier—and by sect. 7

(*f*) 32 & 33 Vict. c. 41.
(*g*) Sect. 6.
(*h*) For the meaning of the word "metropolis" see sect. 20.
(*i*) Sect. 4.
(*k*) Sect. 3.

enacts, that "every payment of a rate by the occupier, notwithstanding the amount thereof may be deducted from his rent as herein provided, and every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate *shall be deemed a payment of the full rate by the occupier* for the purpose of any qualification or franchise which as regards rating depends upon the payment of the poor rate; whilst the 8th section authorizes the occupier to pay the rate, if the owner omits or neglects to do so, and to deduct the amount from his rent (*a*).

The several enactments of the "Poor Rate Assessment and Collection Act, 1869" (*b*) above referred to are very important, because the 58 Geo. 3, c. 69, and 59 Geo. 3, c. 85, apply to *all* parish vestries, and have the effect of disqualifying all persons who are not rated or cannot be deemed to be rated to the relief of the poor, or who have not duly paid or cannot be deemed to have duly paid their poor rates. Where therefore a parish had adopted the Small Tenements Act (13 & 14 Vict. c. 99) (*c*), and the landlords of small tenements were under that Act rated to the relief of the poor instead of the occupiers, it was held that the occupiers, although liable to church rate, had no right to vote at a vestry held for the purpose of making a church rate (*d*).

(*a*) See this statute set out at length in the Appendix.

(*b*) 32 & 33 Vict. c. 41.

(*c*) See a form of a resolution of vestry adopting the Small Tenements Act in *Bavin* v. *Hutchinson and another*, 31 L. J. M. C. 229.

(*d*) *Richardson*, app., v. *Gladwin and Gooday*, resp., 1 E. B. & E. 138. That the occupiers of small tenements remained

It may be well also in this place, although the section has already been set out and commented upon, to direct attention to the 8th section of the "Compulsory Church Rates Abolition Act, 1868," which disqualifies the occupier of premises who shall make default in payment of any church rate for which he is rated from exercising the rights of a vestryman in respect of the expenditure of such church rates, and entitles the owner, on default made by the occupier for one month after demand, to pay the rate, and, until the next succeeding church rate is made, to stand in the place of the occupier for all purposes relating to church rates, including the attending at vestries and voting thereat (*e*).

At common law every inhabitant of the parish was entitled to *one* vote, and no more; but the Vestry Act (*f*) has made some important regulations with respect to the right of voting, transferring the right in effect from the person to the property, or, at least, giving to property a direct influence in those matters, which it did not possess under the former system. It is provided by the third section of the Act, that in all such vestries every inhabitant present, who by the last rate made for the relief of the poor shall have been assessed in respect of any annual rents, profit, or value not amounting to 50*l.*, shall give one vote, and no more; and if assessed for any such annual rent amounting to 50*l.*, or upward (whether in one or more charge), shall be entitled to give one vote for every 25*l.* in respect of which he shall have been assessed, so that no inhabitant shall give more than six votes; and where two or more of

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liable to church rates; see also *Medland and Brown* v. *Payne*, 4 Jur. (N. S.) 1283; 7 W. R. 357.

(*e*) 31 & 32 Vict. c. 109. See the section, *ante*, p. 90.

(*f*) 58 Geo. 3, c. 69.

the inhabitants present shall be jointly rated, each shall vote according to the proportion which shall be borne by him of the joint charge; and where only one of the persons jointly rated shall attend, he shall vote according to the whole of the joint charge; and by 59 Geo. 3, c. 85, s. 2, the clerk, secretary, steward, or agent of any corporation or company may vote for the corporation or company.

It was held, in the case of *Richardson* v. *Gladwin* (*a*), above referred to, that the landlords of the small tenements were not under this provision entitled to more than six votes respectively, whatever might be the number of their small tenements; and in the subsequent case of *Lambe and Clarke* v. *Grieves* (*b*), that they are not entitled to vote separately in respect of the property occupied by them, and of their small tenements respectively, but must combine their qualifications so as to vote according to and in respect of the aggregate charge to which they are liable (*b*).

In like manner where a man is rated for property held by him in his individual capacity, and also for property held by him as executor, the number of votes to which he is entitled will be regulated by the joint value of the two properties (*c*); but where there are more executors than one, he will still be entitled to these votes, if he is the only executor attending the vestry (*d*). Moreover, to entitle an executor to vote, it is not necessary that he should be rated in his own name; it will be sufficient if he is rated as executor of the deceased (*e*).

If a vestry be convened, every ratepayer entitled to vote

(*a*) *Supra*, p. 112.
(*b*) Consist. Hereford, 8 Jur. (N. S.) 288.
(*c*) *R.* v. *Kirby*, 1 B. & S. 647.
(*d*) *Id.*, and see 58 Geo. 3, c. 69, s. 3.
(*e*) *R.* v. *Kirby*, 1 B. & E. 647. In this case the parties were rated as "Finch's executors."

has a right to attend, and may maintain an action at law against any person who illegally obstructs him in the enjoyment of this right (*f*). If he do not attend, he is bound by the acts of those who do (*g*), and therefore whatsoever rate shall be made by the consent of the major part of those who shall come to the said meeting will be a good and legal rate. For those who are absent in this case, devolving their rights and votes upon those who are present, how few soever they be, are in contemplation of law the whole parish. And therefore whatsoever rate is made with the consent of the major part of them at such a meeting, or by the churchwardens alone, if in the calling of such a meeting none else shall appear at it, will be interpreted as made with the consent of the whole parish, for the absence of those who do not come to the said meeting being voluntary, it will imply that they do thereby entrust those who are present with their interest, and if none appear but the churchwardens alone, it will imply a like trust of the whole parish voluntarily reposed in them in this case (*h*).

The mode of voting at a vestry is of great importance and, if it be improperly conducted, may affect the validity of the proceedings. The common law mode of election is by show of hands, or by poll, and the party electing is then said to have a voice in the election. It is clear that at common law, where parties have the right of voting, the restriction of voting by ballot cannot be imposed ; it pre-

(*f*) *Phylibrown* v. *Ryland*, E. T. 8 Geo. 1 ; Shaw's Par. Law, 59. And see *Ashby* v. *White*, Lord Raymond, 938 ; 1 *Smith's* Leading Cases, 105. But to maintain an action against the *returning officer* for rejecting his vote he must show that the defendant acted maliciously: *Tozer* v. *Child*, (in error), 7 E. & B. 377. As against the returning officer the right of the voter is to have his vote fairly considered: Per *Bramwell*, B., in *Tozer* v. *Child*, supra.

(*g*) *Clutton* v. *Cherry*, 2 Phil. 380.

(*h*) Prid. 79.

sents insurmountable difficulty to a scrutiny, because no person can tell for whom a particular individual voted (*a*); besides, under the Vestry Act, where one person may have any number of votes to the amount of six, other objections may present themselves to voting by ballot. It is therefore, evident that the common law mode of voting ought to be adhered to. These reasons are equally cogent against voting by *proxy*.

Moreover, where more than one person is put up as a candidate on each side, it is clear that a show of hands would not be sufficient, because it would fail to express the will of the inhabitants as to each candidate.

In *R.* v. *The Governors and Guardians of the Poor of St. Mary, Newington* (*b*), a local Act (54 Geo. 3, c. cxiii., s. 3), enacted that all vacancies in the list of governors and guardians of the poor should be filled up by poll or ballot, "or in such way of election as should be deemed most proper and convenient," and the mode of election pursued was as follows:—Two candidates were proposed for each vacancy; on a show of hands being taken the one in whose favour it appeared to be was declared elected; and then two other candidates were proposed for the next vacancy, and so on till the vacancies were filled up; it was held that this was not a proper and convenient mode of election, and that it could not be sustained.

It was also held in this case that it was for the meeting itself, and not the chairman, to pronounce what was the most proper and convenient mode of election.

Any voter has a right to demand a poll; for it is, in

(*a*) See *Faulkner* v. *Elger*, 4 B. & C. 449; *Story* v. *Colk and Preedy*, 6 N. E. C., Supplement, xxxiii.

(*b*) 6 D. & L. 162. See also *R.* v. *Munday*, Cowp. 530; *R.* v. *Player*, 3. B. & A. 707.

point of law, a necessary incident, or consequence, to the mode of election by show of hands, wherever it is not by special custom excluded. Independently of any authority on the subject, the recourse to a poll when the population of a parish is large, appears to be the only mode of ascertaining with precision the number of those who vote on each side, and the right of each elector to vote. Again, it is, under the same circumstances, the only mode by which each individual elector can have the power of expressing his opinion at all ; for in the case of populous parishes no vestry-room can be large enough to contain the whole body. Still further, when the election is carried on with any warmth of popular feeling, it is the only mode by which a large portion of the community can express their opinion with freedom and security (*c*).

This right to demand a poll is not waived by waiting until after the chairman has declared the result of the show of hands (*d*) ; for when a poll is demanded, the election commences with it, as being the regular mode of popular elections, the show of hands being only a rude and imperfect declaration of the sentiments of the electors ; and when a poll is demanded, it is an abandonment of what has been done before, and everything anterior is not of the substance of the election, nor to be so received (*e*).

(*c*) *Campbell* v. *Maund*, 5 A. & E. 865. Nor will the fact that no poll has ever been taken in the parish support a custom to decide on the show of hands without a poll. *Ibid.*, and see *Doe d. Edmunds* v. *Llewellin*, 2 C. M. & R. 503.

(*d*) *Campbell* v. *Maund*, supra.

(*e*) *Anthony* v. *Seger*, 1 Hagg. C. R. 13. *Westerton* v. *Davidson*, 1 Ec. & Ad. 385. And see the observations of *Coleridge*, J., in *R.* v. *The Governors of St. Mary, Newington*, 6 D. & L. 162. But where the senior churchwarden was chosen and declared elected *nemine contradicente*, and a poll was subsequently demanded for the junior churchwarden only, and conducted by ballot for the election of such last-named officer it was

Indeed, in the very nature of things, the demand of a poll never can reasonably be expected to be made until the necessity for such a demand arises ; that is, until one of the contending parties is dissatisfied with the decision of the chairman upon the show of hands, from which it is in the nature of an appeal (*a*).

But where a voter is dissatisfied with the decision of the chairman on the show of hands, it is his duty to demand a poll ; if he omits to do so, he will be deemed to have acquiesced therein, and will not be allowed on any subsequent proceedings to insist that the chairman was mistaken in his decision (*b*).

So where a show of hands was first taken, and it was then moved that the votes to be taken according to *Sturges Bourne's* Act, which was accordingly done, and a poll was afterwards demanded by a party who was dissatisfied with the result, it was held that the chairman was justified in refusing a poll (*c*).

And where an amendment was moved and carried, and thereupon a poll was demanded, at which the original resolution was carried, and, on the result of the poll being stated on a subsequent day, a further amendment was proposed, but refused to be put by the chairman on the ground

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held by Dr. *Robert Phillimore*, the official principal of the Archdeaconry Court of London, that the senior churchwarden had been duly elected, and the election by ballot being illegal, he directed the parishioners to proceed to any election of the junior churchwarden only: *Story* v. *Colk and Preedy*, 6 N. E. C., Suppl. xxxiii.

(*a*) *Campbell* v. *Maund*, supra. And see *Tear* v. *Freebody*, 4 C. B, (N. S.) 228.

(*b*) *Cornwall and Pain* v. *Woods*, 4 N. E. C. 555.

(*c*) *R.* v. *Vicar of Hillingdon*, 18 Q. B. 718. And see *Tiarks and Fenning* v. *Hutton*, 35 L. J. (N. S.), Ec. 11 ; L. R. Ec. 270.

that the question was already disposed of, the proceedings were upheld, and a *mandamus* to proceed anew refused (*d*).

But where at a vestry meeting to elect churchwardens on two persons being proposed and seconded for the office of parishioners' churchwarden the chairman refused to take a show of hands, and proceeded at once to enter down the names of the ratepayers present and the number of votes they were entitled to, and then declared A. B. duly elected, although the proceedings were protested against and a poll demanded, the *Court* held the proceeding to be irregular, although they refused a *mandamus* to proceed to a fresh election, as it was not shown that any one had been prevented from voting, or that any injustice had been done in the particular case (*e*).

If, however, a poll be legally demanded, the chairman is bound to grant it, although a majority of the vestrymen present object (*f*). And it seems that where the election is

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(*d*) *R.* v. *Vicar and Churchwardens of Hammersmith*, 19 L. T. 203; 16 J. P. 632.

(*e*) *R.* v. *The Minister and Churchwardens of the Parish of Goole, in the county of York*, 4 L. T. (N. S.) 332.

(*f*) *Cornwall and Pain* v. *Woods*, 4 N. E. C. 555; *R.* v. *D'Oyly, D. D.*, 12 A. & E. 139; 4 P. & D. 52, S. C.; and see *R.* v. *Robinson*, Clerk, ex parte *Oxford*, 27 L. T. 110, where a *mandamus* went to enforce a poll on the refusal of the chairman to grant one on the demand of a vestryman, who at a meeting for passing the churchwarden's accounts had objected to certain items in those accounts, and demanded a poll on an amendment moved by him that the accounts should not pass. And see *The Churchwardens of St. Michael, Oxford* v. *Luff*, 31 L. T. 358, where Dr. *Phillimore*, as Chancellor of the Consistory Court of Oxford, held a church rate bad in consequence of the chairman having refused a poll on an amendment for a smaller rate, although the original motion had been ultimately carried upon a poll; also *Richards* v. *Birley*, 10 L. T. (N. S.) 142, where it was held that a poll may be demanded as to the allowance of any questionable item in the estimate for the church rate, and that if it be refused, the rate will be bad.

regulated by *Sturges Bourne's* Act (*a*), the chairman may, if he think proper, direct a poll, without first taking a show of hands, although a show of hands is demanded, and a poll is not demanded, but objected to ; for where the number of votes depends on property a show of hands cannot decide anything (*b*). But it is not necessary for him in such case to direct a poll at all, unless it be demanded, for although it is undoubtedly true that in this mode of voting by show of hands a majority of individuals may not constitute a majority of votes, yet, if no poll is demanded, the whole vestry must be considered as acquiescing in the decision of the chairman ; otherwise, in every case of a difference of opinion in the vestry there must be a poll, though not demanded, which would be a great impediment to business, and occasion much inconvenience (*c*).

And where a local Act (*d*) directed that all questions, matters, and things proposed in the vestry (with the exception of the appointment of a chairman in the vicar's absence) should be determined in the first instance by a show of hands, which determination should be final and conclusive unless a division were demanded, and that in all cases of division the votes should be taken in the manner prescribed by 58 Geo. 3, c. 69, it was held, that a resolution which was in the first instance submitted to a poll, and had never been put to a show of hands, could not be sustained (*e*).

It may be well to refer here to the recent case of *The*

(*a*) 58 Geo. 3, c. 69.

(*b*) See the observations of *Denman*, C. J., and of *Littledale*, J., in *R.* v. *Rector of Birmingham*, 7 A. & E. 254.

(*c*) Per Sir *S. Lushington*, in *Veley and Joslin* v. *Gosling*, 3, Curt. 253 ; 1 N. E. C. 457, S. C. And see *Cornwall* v. *Woods*, 4 N. E. C. 555, *supra*, p. 119.

(*d*) 5 Geo. 4, c. cxxv.

(*e*) *Elt* v. *The Burial Board of St. Mary's Islington*, 1 Kay 449.

Queen v. *Cooper* (*f*), which is a strong illustration of the necessity for taking the poll when it has been demanded. In that case it appeared that at a vestry meeting for the purpose of electing a waywarden Edward Lowe and John Cooper were each proposed and seconded. A vote of the persons present was taken, and counting each person present as a single vote, the majority were in favour of Lowe. It was then suggested that the election ought to be by plurality of votes, and so counting the votes, the majority were in favour of Cooper. A poll was thereupon demanded on behalf of Lowe, and a time and place appointed for taking it. Several ratepayers attended at the time and place appointed for the purpose of voting, but they did not attempt to enter the room, because they were informed by a notice posted, by the authority of Cooper, on the door, which was shut, but not fastened, that Cooper declined to stand as waywarden, and no poll whatever was taken. Cooper was subsequently informed by the chairman that, as there had been no poll, he was elected churchwarden, and the chairman gave him a certificate of his election. The Court of *Queen's Bench* held, that a poll having been demanded, and none taken, there had been no election, *Cockburn*, C. J., distinguishing the case from *R.* v. *Hillingdon* (*g*), on the ground that in that case it had been agreed by the meeting to abide the result of the poll of those present; and *Lush*, J., adding, that if the parishioners had abstained from voting because both parties were willing to stand by the show of hands, possibly that might have made a difference, but that they were simply unintentionally misled.

When a poll is granted, it should be so regulated as to

(*f*) 5 Q. B. L. R. 457.
(*g*) 18 Q. B. 718.

afford to *all qualified* persons an opportunity of recording their votes, for the right of voting is in all the ratepayers qualified by law, and this right is inalienably vested in them ; the vestry have no power to modify or restrain it by any resolution whatever imposing any additional qualification for a voter, or limiting the period within which the poll is to be taken ; and therefore, in *Faulkner* v. *Elger* (*a*), the Court of *King's Bench* decided that a resolution of vestry that the votes of persons who had not paid the church rates should not be received was illegal, and that an election made on this principle could not be sustained. It is true that there is a power incident to every body to make regulations binding upon themselves, if they be not contrary to law ; but by 58 Geo. 3, c. 69, s. 4, all persons are entitled to vote at vestries who pay poor rates, and the restriction in this case was contrary to law (*b*).

So in *Rex* v. *The Rector, Churchwardens, and Parishioners of St. Mary, Lambeth* (*c*), in which a rule *nisi* had been obtained, calling upon the defendants to show cause why a *mandamus* should not issue commanding them to hold a vestry meeting for the purpose of electing proper persons to be churchwardens for the remainder of the year, the question turned upon the validity of the election of the gentlemen who had been already chosen *de facto* to fill that office.

It appeared that at the meeting of the vestry pursuant to notice, one churchwarden having been appointed on the part of the rector, certain persons were proposed to the parishioners to be the three other churchwardens, it being the

(*a*) 4 B. & C. 449.

(*b*) That a ratepayer has a right to vote, although a third party may have paid his rates for him, see *Richards* v. *Birley*, 10 L. T. (N. S.) 142.

(*c*) 8 A. & E. 356.

custom to have three nominated and appointed, in addition to the rector's warden. Six appearing as candidates, and a show of hands being taken, *Saunders*, *Hunt*, and *Barton* were declared to be elected, whereupon two rated inhabitants handed the following notice in writing to the chairman (who had been appointed in the rector's absence, under 58 Geo. 3, c. 69, s. 2):—"We demand a poll of the whole parish, on behalf of, &c. (the unsuccessful candidates), proposed as churchwardens." Some of the ratepayers then required that the poll should be confined to the vestrymen present; others insisted that a poll of the inhabitants at large should be taken. The chairman took a show of hands (though protested against by many of the ratepayers) on this question. The majority was in favour of polling "the inhabitant ratepayers then present only," and such mode of polling only was allowed by the chairman to take place, two of the ratepayers, however, giving in a written protest against it in the following terms:—"We protest against polling of the inhabitants assembled in vestry only on the election of churchwardens, and require the poll to be taken of the whole parish." The *mandamus* was refused, because it did not sufficiently appear that any single ratepayer had been prevented from voting; but the illegality of the restrictive resolution of the vestry, and the right of *all* the ratepayers to vote, was expressly declared. "There is no doubt," said *Denman*, C. J., "of the law, that the ratepayers in vestry are to elect, and that if a poll be demanded, it should be kept open for all qualified persons. If any single person had been excluded in the present case, it might have been a reason for demanding that the election should be set aside; but I do not find by the affidavits that any person who would have voted was shut out; and if so, nothing has been done to render the case different from what it would have been if the election

had been decided at once. If it had appeared that any one person had been excluded, we would have gone a good way in supposing that the resolution had affected the result of the election."

This right of every qualified parishioner to record his vote is so fully recognized that it is not restrained by a provision in an Act of parliament that the election shall be made by the ratepayer " in vestry assembled, or the major part of them *then present*," unless such restriction be absolutely necessary for carrying out the purpose of the Act, as in *R.* v. *Vestryman of St. Pancras* (*a*), where it was necessary that the inspectors of votes under Sir *John Hobhouse's* Act (*b*), should be nominated at once in order that the ultimate object of the meeting, *viz.*, the election of the vestrymen and the auditors of accounts, might be proceeded with (*c*).

So where a local Act (*d*), after enacting that at a vestry meeting to be held on Easter Tuesday in every year, all vacancies in the list of governors and guardians of the poor should be filled up by poll or ballot, or in such way of election as should be deemed most proper and convenient, proceeded to direct that a vestry meeting should be called on Easter Tuesday in every year, at which said vestry meeting the inhabitants in vestry assembled in such manner and at such times as aforesaid should nominate and choose certain persons to be governors and guardians in the room of those resigning,—it was held that these provisions were not strong enough to control the general rule of law, which requires the poll to be of the parish generally, and that any unsuccessful candidate had a right to demand a

(*a*) 11 A. & E. 15.
(*b*) 1 & 2 Will. 4, c. 60.
(*c*) *R.* v. *Hedger and others*, 12 A. & E. 151; 4 P. & D. 61 S. C.; and see *R.* v. *How*, 32 L. J. M. C. 53, to the same effect.
(*d*) 54 Geo. 3, c. cxiii, s. 3.

poll, although the vacancies had in fact been filled up by a show of hands, as a proper and convenient method of election (*e*).

The language of the Court of *Common Pleas* in their judgment in the case of *White* v. *Steele* (*f*), may be referred to here in further illustration of the inherent right of a vestryman to demand a poll. It is as follows :—

"We think the parish has not legally expressed its desire. We know of no legal mode of ascertaining the desire of a parish, but by convening a vestry, and duly conducting the proceedings therein to their legal termination. It is obvious that a vestry which *refuses* a poll may not, and most likely does not, speak the sense of a parish. Moreover, the right to a poll exists at common law, and rests on the strongest authority. (See *Campbell* v. *Maund*, in the Exchequer Chamber, 5 Ad. & E. 865 ; 1 N. & P. 558.) It has several times been held that the right to a poll is not taken away by mere general words in a statute, which words might at first sight seem to import that the inhabitants assembled at a vestry might then and there finally decide the question."

But the poll must be demanded before the conclusion of the vestry meeting, and, as it would seem, before the conclusion of the special business in respect of which it is demanded ; for if the vestry meeting is over (*g*), or, as it would seem, the special business otherwise concluded (*h*),

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(*e*) *R.* v. *The Governors of St. Mary, Newington*, 6 D. & L. 162, and see *Elt* v. *The Burial Board of St. Mary's, Islington*, 1 Kay, 449.

(*f*) 12 C. B. (N. S.) 406.

(*g*) Ex parte *Graves*, re *The Mayor of Peterborough*, 58 "Law Times," 287. S. C. *nom. R.* v. *Mayor of Peterborough*, 44 L. J. Q.B. 85.

(*h*) Re *The Vicar and Churchwardens of Holy Trinity, in Over Darwin*, Easter Term, 1875. The author has been furnished with a note of this case by Mr. *Bush Cooper*, the counsel engaged in it.

before the poll is demanded, it will be too late to demand a poll. The very recent case in the Court of *Queen's Bench*, of Re *The Vicar, &c., of Holy Trinity in Over Darwin* (*a*), is a strong illustration of this principle. In that case, the notice of vestry was to elect churchwardens. At the vestry meeting, the vicar having nominated his churchwarden, two candidates were proposed as parishioners' churchwarden, one of whom was declared elected upon a show of hands. The parishioners then proceeded, as they had done in previous years, to elect two sidesmen, although no mention of sidesmen was made in the notice of vestry ; and after the election of the sidesmen a poll was demanded on behalf of the unsuccessful candidate for the office of churchwarden, and refused. The Court, on an application for a rule *nisi* for a *mandamus* to convene a vestry and proceed to a poll for the election of a churchwarden, held that the special business of the election of churchwardens had been concluded before the demand of the poll, and that the poll was rightly refused.

Another incident to the right of every qualified ratepayer to record his vote is the necessity of keeping the poll open sufficiently long to enable them, one and all, to exercise the privilege, and unless there be a custom to regulate the time during which the poll is to be kept open, it is not competent to a majority of the electors assembled at the time of the election, to narrow the period which the common law would allow (*b*).

Nor can the chairman close the poll prematurely, even on account of disturbances arising thereat. The proper course in such a case is to adjourn the vestry ; if he closes

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(*a*) See note (*h*), *ante*, p. 125.

(*b*) *R.* v. *Commissary of the Bishop of Winchester*, 7 East, 573 ; *Westerton* v. *Davidson*, 1 Eccl. & Ad. 385.

the poll a *mandamus* will lie to compel the calling of a vestry to hold the election (*c*).

It is not, however, very easy to determine what time should be allowed, so as to give every person entitled an opportunity of recording his vote, and all that can be said is, that, where no custom exists, a reasonable time should be given; but the time need only be fixed so as to allow every person *qualified* at the time to record his vote, without any reference as to what may be done by persons not already qualified. It is no part of the purpose for which a poll is demanded that it should give time for the payment of the rates, but only to allow persons already qualified sufficient time to tender and record their votes (*d*).

In all cases of equality of votes the chairman, in addition to his vote according to his assessment, shall have the casting vote (*e*).

The question as to the right of adjournment of vestry meetings, especially with reference to their adjournment for the purpose of polling, has been much discussed in some late cases.

It seems clear upon principle, as well as upon authority, that the chairman of a vestry meeting has no authority to interrupt, adjourn, or postpone the business of the meeting; his duty in the chair is merely to regulate the proceedings, and, as far as he can, to forward the business, which the meeting is assembled to despatch, if it be such as the meeting can legally entertain and proceed on: any attempt on

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(*c*) *R.* v. *Graham*, 9 W. R. 738.

(*d*) *Baker and Downing* v. *Wood*, 1 Curt. 507. And see *R.* v. *Overseers of Sutton, Lancashire*, 13 W. R. 187; 11 L. T. (N. S.) 487, S. C.

(*e*) 58 Geo. 3, c. 69, s. 2

his part, therefore, to stop or postpone the meeting is a violation of his duty, and altogether illegal. In discussing the matters brought before the meeting, or on determining whether they were to be discussed on one day or another, and in voting upon them, he has no more authority, nor any further voice, than any other member of the vestry, except when by statute, in case of an equality of votes, he has the power to give a casting vote. But whilst the business is actually in progress, he may, and ought to adopt the well-established rules of public meetings, to regulate, control, and direct the course of proceedings, and in cases of difference of opinion so to order and conduct his arrangements as to enable every member to express his opinion, and, if necessary, give his vote, without personal inconvenience and difficulty; whereby the real opinions of the voters may be ascertained in a satisfactory and impartial manner (*a*).

In *Stoughton* v. *Reynolds* (*b*) it was decided that the right of adjourning a meeting whilst the poll for the election of a churchwarden was proceeding, was not vested in the chairman of such meeting, but in the whole, the assembly, where all are on an equal footing; and although there might be a difficulty in polling for an adjournment, yet as there was no other way, that must be taken (*c*).

This difficulty, however, need not exist, for if the public notice of the meeting of the vestry specified that in the event of a poll, an adjournment will be made from day to day, the notice will be binding upon the meeting, and the chairman be authorized to adjourn in furtherance of it; for in such case no business is interrupted, and the

(*a*) Rogers' Eccl. Law, tit. "Vestry."
(*b*) 2 Stra. 1045; Fortes. 168; Cas. temp. Hard. 274.
(*c*) 2 Burr. 1020.

adjournment is in pursuance of the original appointment (*d*).

The late Mr. *Rogers*, in his valuable work on *Ecclesiastical Law*, has the following pertinent observations, arising out of the case of *Stoughton* v. *Reynolds* :—

"In this case the adjournment was one of time, and was in fact an interruption of business legally proceeding, and the purpose of a postponement of it to a future time was without any plea of necessity, or even convenience, to justify it.

"If the chairman have an arbitary power of postponement for a day, why not for a week or a longer period? But this decision by no means interferes with the right which every chairman has to make a *bonâ fide* adjournment whilst a poll or other business is proceeding, if circumstances of violent interruption make it unsafe or seriously difficult for the voters to tender their votes, nor of adjourning the place of polling, if the ordinary place used for that purpose be insufficient or greatly inconvenient. In most of such cases the question will turn upon the intention and effect of the adjournment; if the intention and effect were to interrupt and procrastinate the business, such an adjournment would be illegal; if, on the contrary, the intention and effect were to forward and facilitate it, and no injurious effects were produced, such adjournment would, it is conceived, be generally supported" (*e*).

This view of Mr. *Rogers* is borne out by the case of *R.* v. *The Churchwardens of St. Mary, Lambeth* (*f*). In that case, the rector, who was in the chair, on a poll being

(*d*) *R.* v. *Archdeacon of Chester*, 1 A. & E. 361; *Baker and Downing* v. *Wood*, 1 Curt. 507.
(*e*) Roger's Eccl. Law, tit. "Vestry," p. 874.
(*f*) 1 A. & E. 346, note (*b*).

demanded, adjourned the meeting for that purpose from the school-house (where the meeting was holden by appointment), to the church, of his own authority. The poll was gone into on the same day, and continued on subsequent days at the church, no *previous notice having been given of such adjournment.* In support of the election statements were made tending to show that the poll could not have been taken properly, if at all, in the school-house, from the nature of the place, the numbers, and tumultuous state of the meeting; a former practice of electing in the church, and the alleged acquiescence on the present occasion of the parties complaining, were also insisted upon. The election was held to be good.

It has also been subsequently decided in the case of *R.* v. *D'Oyly, D.D.* (*a*), that the chairman may adjourn the meeting, even against the consent of the majority present,—on his legal responsibility, if, in so doing, he improperly disturbs the proceedings.

But the case of *Stoughton* v. *Reynolds* (*b*), is recognized and upheld by the last-named case, and also by the cases of *R.* v. *The Archdeacon of Chester* (*c*) and *Baker* v. *Wood* (*d*). as an authority against the right of the chairman to adjourn, when the intention and effect of the adjournment are to interrupt and procrastinate the business.

In further illustration of this principle it may be mentioned that in the recent case of *R.* v. *Dr. Stephens, Chancellor of Bangor* (*e*), the Court of *Queen's Bench* made absolute a rule for a *mandamus* to the Chancellor to admit a

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(*a*) 12 A. & E. 139; 4 P. & D. 52, S. C. That no notice of the intended adjournment is necessary, see *ante*, p. 107.

(*b*) 2 Str. 1045, Forbes, 168; *Cas. temp.*, Hard. 274.

(*c*) 1 A. & E. 342.

(*d*) 1 Curt. 507, see p. 521.

(*e*) Trinity Term, 1870. The author, who was one of the counsel in the case, is not aware of any report of it.

churchwarden who (the rector still being in the chair), had been elected by the parishioners at a vestry meeting called for the election of churchwardens, although the rector, who claimed and had *de facto* exercised at the meeting the right of nominating both churchwardens, had refused, and persisted in refusing to put the resolution for the election of the parishioners' churchwarden to the vestry; and this was on the ground that in so doing he had acted *ultra vires*:—otherwise the proper course would have been to obtain a *mandamus*, not to admit, but to proceed to the election of a churchwarden in vestry assembled.

As every qualified ratepayer has a right to vote, the poll must of course be taken in a place to which he has access; but it is no objection to the validity of the proceedings that the place is *private* property, unless access be in fact denied.

In *Baker and Downing* v. *Wood* (*f*) the adjournment was from the vestry room to the town hall, which was *private* property, and with reference to this part of the case the learned judge said,—"With respect to the town hall being private property, no person appeared to have been prevented from entering the room, nor was it suggested that any parishioner was deterred from proceeding there by any apprehension that he would be excluded. In the case of *R.* v. *The Archdeacon of Chester* (*g*) the town hall was equally private property; no person could be admitted into the town hall of Manchester of *right*, yet no objection was raised in that case that the parishioners had not a perfect right of access to the town hall. It is proper to fix on a convenient place, and the town hall was as convenient a place as could be selected. There was no reason why any

(*f*) 1 Curt. 507.
(*g*) 1 A. & E. 342.

person should have stayed away ; there was not any appearance of obstruction, or of any one having been prevented from recording his vote ; and no party made any demur at first to the town hall ; they seem to have acquiesced, and tendered their votes as for acceptance there."

When a poll is taken, the poor rate books should, if required, be produced for the purpose of showing who are qualified to vote, and how many votes the respective ratepayers are entitled to give ; and if, upon a subsequent scrutiny, the churchwardens and overseers of the poor, or such other persons as may have the custody of these books (*a*), refuse to produce them, they may be compelled by *mandamus* (*b*).

The duty of receiving or rejecting the votes tendered (*c*), will, of course, rest with the chairman, and if his adjudication is made *bonâ fide*, the election will not be void by reason of his having erroneously rejected certain votes, or even all the votes of a particular class of claimants (*d*) ;

(*a*) See 58 Geo. 3, c. 69, s. 6.

(*b*) *R.* v. *Churchwardens and Overseers of Lambeth*, E. T. 1839, MS. ; *R.* v. *Fall and others*, 1 Q. B. 636. That a scrutiny cannot be demanded as a matter of right, see *R.* v. *The Vicar of Hammersmith*, 19 L. T. 203 ; 3 B. & S. 504 (*n*), and that the decisions of the chairman cannot be subsequently reviewed by scrutineers to be appointed for that purpose, although he may call in the aid of assessors during the polling, to assist him in determining on the validity of the votes, see *R.* v. *The Vicar of Wakefield*, 7 L. T. 227 ; 10 J. P. 386.

(*c*) That the election will not be invalidated, if the voters refrain from tendering their votes in consequence of the chairman having already rejected similar votes, see *Richards* v. *Birly*, 10 L. T. (N. S.) 142.

(*d*) Ex parte *Mawby*, 3 E. & B. 718 ; S. C. *nom.* ex parte *Joyce and others*, 23 L. J. (N. S.) M. C. 153. In this case the chairman had rejected the votes of the *occupiers* of small tenements rated in the poor rate to the *owners* under 13 & 14 Vict.

except, perhaps, in the event of its being shown that the result of the election would have been different, if the votes had been admitted (*e*).

Before quitting this subject it may be remarked that the parson and other occupiers of church lands not assessable to the church rate are, if otherwise properly qualified, entitled to vote at the vestry on questions of church-rate (*f*).

It may be well also to mention here that it is provided by the 17th section of "The Poor Rate Assessment and Collection Act, 1169," (*g*) that a poor rate shall be deemed to be made on the day when it is allowed by the justices, and if the justices sever in their allowance, then on the day of the last allowance; and by the 18th section, that the production of the book purporting to contain a poor rate with the allowance of the rate by justices, shall, if the rate is made in the form prescribed by law, be *primâ facie* evidence of the due making and publication of such rate.

It can scarcely be necessary to observe here, that no undue influence of any kind should be exercised over the ratepayers with a view of securing their votes. In *Butt* v. *Fellowes* (*h*), Sir *Herbert Jenner Fust* severely censured a churchwarden for having supplied refreshments for the persons who voted for the rate. The learned judge said, that this did not necessarily vitiate the rate, but that the Court could not see such a practice taking place in a parish without expressing its disapprobation of it. The responsive allega-

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c. 99. The *Queen's Bench* refused a *mandamus* for a fresh election, for the reason mentioned in the text. That such occupier had, however, at that time no right to vote, see *Richardson*, app., v. *Gladwin and another*, resp., 1 E. & E. 138, *ante*, p. 112.

(*e*) Ex parte *Mawby*, supra.

(*f*) *Ranson* v. *Campkin*, 2 Roberts, 370.

(*g*) 32 & 33 Vict. c. 41.

(*h*) 3 Curt. 680.

tion in that case, which pleaded, "that the said William Butt provided a quantity of beef and ale, and openly and publicly declared that they were for those who voted for the rate, and that rather than be beat he would stand or furnish at his own expense a cask of gin; and that, on any poor parishioner polling for the rate the said William Butt, in most or many instances, gave him a ticket entitling the bearer to partake of the beef and ale," was opposed, as not furnishing any answer to the validity of the rate, but admitted by the learned judge as having a bearing on the costs of the suit at the hearing.

Minutes of the proceedings and resolutions of every vestry are to be fairly and distinctly entered in the vestry book, and signed by the chairman, and by such other of the inhabitants present as shall think proper to sign the same (*a*).

The parishioners do not, by signing any such resolution, incur separate or individual responsibility, for, in so doing, they act merely as vestrymen, without any intention of becoming personally responsible (*b*); unless, indeed, the resolution guarantee the payment of expenses, in which case they have been held to be personally liable (*c*).

It is a common practice to confirm the acts of the vestry at a subsequent vestry, but this is not necessary to give them validity (*d*); on the other hand, the acts of one vestry are not, as a general rule, absolutely binding on a succeeding vestry (*d*); but where two persons had been elected churchwardens at a vestry meeting, it was held by

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(*a*) 58 Geo. 3, c. 69, s. 2.

(*b*) *Lanchaster* v. *Tricher*, 1 Bing. 201; 8 Moore 20, S. C. *Lanchaster* v. *Frewer*, 2 Bing. 361; 9 Moore, 688, S. C. *Sprott* v. *Powell*, 3 Bing. 478.

(*c*) *Heudebourck* v. *Langton*, 3 C. & P. 566; 10 B. & C. 546.

(*d*) *Mawley* v. *Barbet and Alt.* 2 Esp. 687.

Lord *Kenyon* that they had immediately on their election acquired a legal *status*, which precluded a subsequent vestry from rescinding the election and proceeding to a fresh election (*e*).

In many cases, as has been before intimated (*f*), the management of the affairs of the parishes or places is, in part or in whole, vested in *select* vestries, existing in some cases, by custom (*g*), in others, under Sir *John Hobhouse's* Select Vestry Act (*h*), in others, under the Act of Queen Anne for building new churches (*i*), and, in others, under specific Acts of parliament applicable to the respective parishes or places (*k*).

There were also, until recently, select vestries under the Church Building Acts ; but it is now provided by 14 & 15 Vict. c. 97, s. 23, that "from and after the passing of this Act no select vestry shall be formed under the provisions of the Church Building Acts ; and every such select vestry already formed under such provisions shall be and is hereby declared to be abolished, and all the powers and provisions therein enacted relative to such select vestries shall henceforth cease and determine ; provided that all matters and things done by any such select vestry in pursuance of any powers given them by such Acts, or any of them, shall be and remain as valid as if such select vestry had not been abolished."

(*e*) *Mawley* v. *Barbet and Alt*, 2 Esp. 687.
(*f*) *Ante*, p. 26, *et seq.*
(*g*) *Batt* v. *Watkinson*, 2 Lutw. 1027 ; *Gibbs* v. *Flight*, 3 C. B. 581.
(*h*) 1 & 2 Will. 4, c. 60.
(*i*) 10 Anne, c. 11.
(*k*) No mention is made in this enumeration of select vestries constituted specifically and exclusively for the management of the affairs of the poor, as the matter is foreign to the subject in hand.

The first-mentioned of these Acts, Sir *John Hobhouse's* Act (*a*), is added in the Appendix, and it will not therefore be necessary to set out its contents in this place (*b*).

By the Act of Queen Anne, for building fifty new churches in the city of London (*c*), it is enacted, that five or more of the commissioners appointed by that Act, with the consent of the bishop or ordinary of the place, shall appoint a convenient number of sufficient inhabitants of each new parish created by the Act to be vestrymen; and from time to time upon the death or removal of any such vestrymen, the rest or majority of these may choose another, being an inhabitant or householder of the parish.

The statutory enactments by which the select vestries under the Church Building Acts—(now abolished, as above-mentioned by 14 & 15 Vict. c. 97, whilst the validity of all matters lawfully done by them before the passing of that Act is expressly provided for)—were created and regulated by 59 Geo. 3 c. 134, s. 30; 3 Geo. 4 c. 72, s. 10; and 3 & 4 Vict. c. 60, s. 8. These special vestries have now been so long abolished that it has been thought sufficient to refer to the sections in question, and has not been deemed desirable to set out their contents, as was done in previous editions of this work.

Select vestries under local Acts of parliament for the building of particular churches are by no means uncommon,

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(*a*) 1 & 2 Will. 4, c. 60.

(*b*) For the construction of this Act, see *R* v. *Vestrymen of St. Pancras*, 1 A. & E. 80; 3 N. & M. 425, S. C; *R.* v. *St. Pancras (New Church) Trustees*, 5 N. & M. 219; *R.* v. *Vestry of St. Marylebone*, 5 A. & E. 268; *R.* v. *St. James', Westminster*, 5 A. & E. 391; *Hall* v. *Maule*, 7 A. & E. 721; *R.* v. *Vestrymen of St. Pancras*, 11 A. & E. 15; *R.* v. *D'Oyly, D.D.*, 12 A. & E. 139; 4 P. & D. 12, S. C.

(*c*) 10 Anne, c. 11.

the persons who are to act as vestrymen being, of course, specifically pointed out in the respective Acts (*d*).

It is not, however, intended to enter into details with reference to these Acts, as this would be a task of considerable difficulty, productive of no corresponding benefit.

Every select vestry must exist in one of the ways abovementioned, that is to say, either by custom or by Act of parliament (*e*): it cannot be constituted by a faculty from the bishop, or in any other manner (*f*).

A select vestry in all matters within its scope and authority, supersedes the power of the common law vestry (*g*); and, being for the most, in derogation of the rights of the parishioners at large, it is viewed by the law with much jealousy. Where it exists by custom its functions are, in all cases strictly limited to those which it has exercised time out of mind; and where, on the other hand, it exists by Act of parliament, the terms of the Act will be most strictly construed, so as not to oust the parishioners at large of any of their rights, by vesting the enjoyment of them in the select vestry, unless the same be either expressly, or by necessary implication, given by the Act to such select vestry.

Thus, in *R.* v. *Woodman and another* (*h*) it was held that a select vestry, which had existed time out of mind for the management of parochial affairs, could not elect another select vestry for the management of the poor under 59 Geo. 3, c. 12, but that the election must, notwithstand-

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(*d*) See Steer's Par. Law, 265, and Burn's Eccl. Law, by *Phillimore*, tit. "Churchwardens" [and *Vestry*].

(*e*) *Berry* v. *Banner*, Peake's Rep. 156; *Goodall and Gray* v. *Whitmore and Fenn*, 2 Hagg. 347.

(*f*) *Berry* v. *Banner*, Peake's Rep. 156; *Golding* v. *Fenn*, 7 B. & C. 781; 1 Man. & Ry. 647, S. C.; Shaw's Par. Law, 60, 61.

(*g*) *Clarke* v. *King*, 2 Y. & J. 525.

(*h*) 4 B. & A. 507.

ing the existence of such select vestry, be made by the parishioners at large in open vestry assembled (*a*).

And in *Cockburn* v. *Harvey* (*b*) it was held that, notwithstanding the wording of the 30th section of 59 Geo. 3, c. 134, which directs the appointment of a select vestry for the care and management of the district church and all matters relating thereto (*c*), and also that of the 70th section of 58, Geo. 3, c. 45, which directs the repairs to be made by rates upon the district (*d*), a select vestry appointed under the provisions of the above Act had no power to impose a rate for the repair of the district church, on the ground that Acts of parliament which take away the rights of parties, ought to be strictly construed, and that there being many concerns of the church, and many matters relating thereto, to which the 30th section might be held to apply, independent of making rates for its repairs, the words of the section were not sufficiently strong to deprive the inhabitants at large of their common-law right of making the rate in vestry assembled.

It was urged in this case, that great inconvenience would result, if the power of making rates were vested in different parties from those who had the general care and management of the affairs of the parish, and the appointment of the churchwardens; but the Court said, that it could

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(*a*) See further to this subject, *R.* v. *Churchwardens of St. Bartholomew the Great*, 2 B. & Ad. 506; *R.* v. *Churchwardens of St. Martin-in-the-Fields*, 3 B. & Ad. 506. See also *Berry* v. *Banner*, Peake, 177; *Golding* v. *Fenn*, 7 B. & C. 765; 1 M. & R. 647, S. C.

(*b*) 2 B. & Ad. 797. The Court *Christian* had previously decided that the select vestry under that Act had the power of making church rates, and the *King's Bench* had apparently acquiesced in that decision. See *Blackett* v. *Blizzard and another*, 9 B. & C. 851.

(*c*) See this section, *ante*, p. 28.

(*d*) See this section, *ante*, p. 80.

know the intention of the legislature only from the words of the statute, and that the inconvenience arising in this case did not appear to be greater than that which must take place under 59 Geo. 3, c. 12, whereby a select vestry might be appointed for the concerns of the poor, leaving the power of making rates to the persons who before possessed it, that is, to the churchwardens and overseers.

The power of the select vestry in this case to make a church rate was further insisted upon from the language of 3 Geo. 4. c. 72, s. 10, which expressly recognized the existence of such power in the select vestry of the district of the original parish church ; but the Court observed, that it was obvious that this section was confined in terms to the previous existence of a select vestry in the original parish, and it was by no means a necessary consequence, that because the legislature thought fit to give the power of making rates (assuming such power to be thereby given) to the select vestry of a new parish taken out of an old parish, wherein a select vestry had that power before, therefore the select vestry of such a new parish should have that power when it was not previously vested in a body of the same description in the old parish, so that the giving of that power in a case like the present could at most be considered as a matter only of doubtful, and by no means of necessary or even clear, implication.

Upon a careful perusal of the section in question, it will appear, that the power of making rates was confined in terms not merely to cases where the original select vestry had that power (the words being "they shall *continue* to act," &c.), but even in such cases, to the select vestry of the district of the *original parish church:* so that there can be little doubt, according to the strict principle of interpretation above stated, that no such power would, even where it existed in the original vestry, have been conferred by the

Act upon the select vestries of the other districts into which the parish may have been divided.

The recent case of *Gibbs and another, Churchwardens of the Parish of St. Stephen, Walbrook* v. *Flight and another* (*a*), affords a further instance of the strictness with which the powers of a special vestry are construed by the Courts. In that case it appeared that, according to the custom of the parish, two churchwardens were to be chosen annually by the select vestry, the select vestry being composed of the clergyman for the time being, and of those who had been elected to the office of churchwarden, and had either served it, or been fined for not doing so. The evidence showed that the usual course had been to appoint the junior churchwarden of the preceding year to the office of senior churchwarden, and to elect the junior churchwarden from the parishioners at large. It was held that the select vestry were not justified in repeatedly re-electing the same person to the office of senior churchwarden, without any necessity for so doing, and that an election made under such circumstances could not be sustained (*b*).

But where by ancient custom the select vestry was to consist of the rector, churchwardens, and those who had served the office of upper churchwarden and other parishioners to be elected by the vestrymen, and the practice in modern times had been to elect as vestrymen those parishioners only who had been fined for not serving the office of

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(*a*) 3 C. B. 581.

(*b*) The learned reporters, in a note to this case, remark that the principal would appear to be applicable to the case of a *single* re-election. The point arose upon a special case, and a writ of error upon the judgment was subsequently brought in the *Exchequer Chamber*, but no judgment was given in that Court, the case having been otherwise arranged between the parties, *vide supra*, p 46, note (*d*); and see *Gibbs and another* v. *Flight and another*, 17 Jur. 1034.

upper churchwarden, it was held that these last were well elected and the vestry well constituted. The power of choosing vestrymen was, in its own nature, not limited to a particular description of parishioners, and a practice to limit for their own convenience their choice to persons of a particular class, was not by any means inconsistent with the custom, because it was competent to the vestry, at any time, to elect other persons who were not of that class (*c*).

And where a local Act (5 Geo. 1, c. xix.) for making the town and township of Sunderland a distinct parish, from the parish of Bishop Wearmouth in the county of Durham, after making Sunderland a distinct parish, proceeded thus —"that the inhabitants of the same parish shall from time to time and at all times hereafter be subject and liable to the customs and usages for the choice of churchwardens, overseers of the poor, and other parish officers within that parish, as the inhabitants of the said parish of Bishop Wearmouth have hitherto been, and for preserving better order in the said parish of Sunderland, and for the better raising and ascertaining for the future all taxes, assessments, and contribution which are or shall be necessary for or towards buying of bells for the said new church, and for finishing the said church and keeping the same in good repair, defraying the yearly expenses and disbursements of the churchwardens concerning the same, &c., and for appointing the scavengers, &c., it is enacted, that the inhabitants shall choose twenty-four vestrymen for the parish, who are empowered to make bye-laws and rules in matters relating to the said church, and to make rates for keeping the said church in repair and defraying the yearly expenses of the churchwardens entering the same," and the vestry

(*c*) *R.* v. *Brain*, 2 B. & Ad. 614.

elected under the Act had ever since its passing chosen the churchwardens and nominated the overseers of the poor and parish constables, as it had been customary for the ancient vestry of Bishop Wearmouth to do; and had also made church rates for the repair of the church and churchyard of Sunderland and for other ecclesiastical purposes; and whenever it had been necessary to enlarge the said churchyard, had obtained and provided different land for the purpose, and had enclosed the same and paid the expenses thereof by a rate raised for the purpose;—it was held that this vestry was a "vestry elected under the provisions of a local Act of parliament for the government of a parish by vestries," within the meaning of 15 & 16 Vict. c. 28, ss. 10, 51, and was the proper body to determine whether a burial ground should be provided for the parish under the provisions of that statute, and of 16 & 17 Vict. c. 134, s. 7 (*a*).

It is essential to the validity of the acts of a select vestry, consisting of a definite number of vestrymen, that every member should have been duly summoned (*b*), and that a majority of the whole number should have been present at the vestry meeting (*c*); but when the vestry consists of an indefinite number, it seems not to be necessary that such majority should be present (*d*). Where, however, the acts of a select vestry, consisting of an indefinite number, were to be done by the vestrymen or the major part of them, at a meeting to be held in the vestry of

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(*a*) *R.* v. *Peters*, Clerk, 6 E. & B. 225. See also the subsequent case of *R.* v. *Gladstone and eight others*, 6 E. & B. 575, where a select vestry for the relief and management of the poor was held not to be a vestry within these statutes.

(*b*) *Dobson* v. *Fussy*, 7 Bing. 305.

(*c*) *Blackett Blizzard and another*, 9 B. & C. 851.

(*d*) *R.* v. *The Overseers of Christ Church, Middlesex*, 7 E. & B. 409, confirmed in error, 7 E. & B. 421.

the parish (*e*), it was held that a majority of those present must concur in the resolutions, and that a resolution passed by a majority of those who voted, not being a majority of the whole number present could not be sustained (*f*).

It is usual for the vestry to appoint a *clerk*, for the better management of the duty that devolves on them ; but this is an office of merely a private nature ; it depends altogether upon the will of the inhabitants, who may elect a different clerk at each vestry. Neither is any salary annexed to the situation : if the fees are to be paid out of the poor rates, there is an end to all prescriptive right to it. As to any supposed agreement made by the parishioners that such should be an annual office, it cannot be obligatory longer than the parties choose to fulfil it, for it may be revoked at the next vestry. It is not, therefore, a fixed permanent office, for which a *mandamus* will lie (*g*). These observations, however, do not apply to parishes within which the recent Act to prevent the holding of vestry or other meetings in churches, and for regulating the appointment of vestry clerks (*h*), has been put in force by order of the Poor Law Commissioners. Such parishes are required to have vestry clerks, and the statute provides for their appointment (*i*), removal (*i*), duties (*k*), and salaries (*l*).

(*e*) See 18 Geo. 3, c. 74 (local and public).

(*f*) *R.* v. *Overseers of Christ Church, Middlesex,* 7 E. & B. 409, confirmed in error 7 E. & B. 421.

(*g*) *R.* v. *Churchwardens of Croydon,* 5 T. R. 1873. In this case a question was incidentally raised, as to whether a vestry clerk could enforce the production of parish books by *mandamus,* but the point was not decided.

(*h*) 13 & 14 Vict. c. 72. See this statute in the Appendix.

(*i*) Sect. 6.

(*k*) Sect. 7.

(*l*) Sect. 8.

The *beadle* of the parish is another officer of the vestry, appointed by them as their messenger or servant.

His business is to give notice to the parishioners when and where a vestry meeting is appointed ; to attend upon it, when met, and to execute its orders.

He is also to assist the churchwardens, overseers, and constables in their respective duties, when commanded ; and generally to do and execute all the orders and business of the vestry and of the parish, as their messenger or servant (*a*).

The salary of the beadle is payable out of the church-rate (*b*).

Beadles may, in like manner, be appointed for the various classes of churches and chapels under the Church Building Acts, their salaries in the case of subscription churches, being payable out of the pew rents (*c*).

Parish clerks and *sextons* cannot perhaps, in strictness be considered officers of the vestry ; but it may not be amiss in this place to make a few observations upon these inferior officers of the church.

Parish clerks were originally real clerks in holy orders, of whom every minister had at least one, to assist under him in the celebration of divine offices, and therefore usually chosen by him. They were afterwards called clerks, though not in holy orders. Their business at first was to officiate at the altar, and say masses for the dead ; and they had a competent maintenance for the service by the offerings made at those altars where they officiated, of which there were formerly several in every church (*d*).

Since the Reformation there is but one clerk in a parish,

(*a*) See Shaw's Parish Law, 64.
(*b*) See Eccl. Law Rep. 46.
(*c*) See 1 & 2 Will. 4, c. 38, s. 16.
(*d*) Shaw's Parish Law, 54.

who by the 91st canon is still to be chosen by the minister, who is to signify his choice to the parishioners, the next Sunday following, in the time of divine service (*e*); but it seems that this is not necessary to the validity of his appointment (*f*).

During the suspension of the incumbent a stipendiary curate licensed by the bishop under 3 & 4 Vict. c. 86 is the proper person to appoint the parish clerk upon a vacancy occurring during such suspension, such stipendiary curate being "the minister of the place for the time being" within the meaning of the canon (*g*); and the appointment by him should be general in its terms (*g*); but it is not competent for a stranger to object that it is made during the suspension only (*g*).

The parish clerk is, however, by the custom of some places, chosen by the parishioners at a vestry held for that purpose; and where such a custom prevails, it is considered as a temporal or civil right in the parish, and the ordinary is compellable by *mandamus* to confirm their appointment by admitting the person chosen by them into office (*h*); and prohibition will lie if he proceed to swear in a person chosen by the rector (*i*).

The person chosen to this office must be at least twenty years of age: persons under that age not being thought of sufficient sedateness or discretion for the duties of the

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(*e*) Shaw's Parish Law, 54; and see *R.* v. *Inhabitants of Bobbing*, 1 N. & P. 166; Gibs. 214.

(*f*) *R.* v. *Bobbing*, supra; *Jermyn's case*, Cro. Jac. 670.

(*g*) *Pindar* v. *Barr*, 4 E. & B. 105.

(*h*) Cro. Car. 589; 2 Roll. Abr. 234; Viner's Abr. *mandamus* (H. 3); 3 Bac. Abr. 531.

(*i*) *Jermyn's case*, Cro. Jac., 670; Com. Dig. Prohibition F. (14), and see *Walpole* v. *Coldwell*, Roll. Abr. Prohibition F. 42, where the election was in the churchwardens.

office. He must also be able to read and write, and should have a competent knowledge in the practice of psalmody, that he may be able to assist the parishioners in that part of their devotion (*a*).

In order to render his appointment valid, it is not necessary that it should be made by deed (*b*), nor, as it seems, in writing (*c*).

When he has been duly chosen and appointed he is usually licensed by the ordinary (*d*); but such license is not necessary, and he may legally execute his office without it (*e*).

He has a power to appoint a deputy, who may in like manner discharge the duties of the office without license from the ordinary (*f*).

But he cannot assign his office, and if he purport to do so by deed, the deed will only operate as the appointment of a deputy, and an action for the fees of the office must still be brought in his name (*g*).

The parish clerk whether appointed by the minister or the parish, is considered by the common law as a *lay* officer, and could not, until very recently (*h*), be removed, although he might be censured, by the ordinary (*i*). The proper parties to remove him (irrespective of the operation of the recent statute, which gives this power, under certain con-

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(*a*) Can. 91.
(*b*) *Roberts*, app., *Drewett*, resp., 18 C. B. (N. S.) 48; 1 Hop. & Phil. 132 S. C.
(*c*) *Anon.* Loff. 434.
(*d*) Johns, 204.
(*e*) *Peake* v. *Bourne*, Str. 942; Lee, 587; 1 Lee, 354, in note.
(*f*) *Peake* v. *Bourne*, supra; and see 7 & 8 Vict. c. 59, s. 5. *post*, p. 151.
(*g*) *Nichols* v. *Davis*, 4 C. P. 80. L. R.; 38 L.J. C. P. 127.
(*h*) See 7 & 8 Vict. c. 59, s. 5, *post*, p. 151.
(*i*) Cro. Car, 580; *R.* v. *Ashton*. Sayer, 159.

ditions, to the ordinary) (*k*), are those by whom he was appointed; but as he is considered as having a freehold for life in his office, during his good behaviour, they have no power to remove him at pleasure, but only for gross misconduct; and if he be removed without good and sufficient cause, he may be restored by *mandamus* (*l*). *Mandamus*, however, does not lie to restore a deputy parish clerk (*m*). It must be remembered here, that however great the misconduct of a parish clerk may have been, he cannot be lawfully removed without having been first duly summoned to answer the charges against him, although the offence may have been committed within view of the party removing (*n*), or he may in fact have been present at the time of his dismissal (*o*), or may have been previously summoned and reproved, and told that he would be dismissed, if he offended in like manner again (*p*).

The proceedings against him, moreover, must be in the nature of a judicial inquiry; and to warrant his removal in default of appearance, the summons must distinctly acquaint him that the proceedings are taken with a view to such removal (*q*).

If the clerk have been improperly removed, it will be no answer to say that the office is full, and a return to this effect cannot be sustained (*r*).

But the application must be made promptly, and it will be no excuse to say that the delay has arisen through the

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(*k*) See 7 & 8 Vict. c. 59, s 5.
(*l*) *R.* v. *Ashton*, Sayer 159; *R* v. *Erasmus Wilson*, Cowper, 373; 3 Roll. Abr. 234; Gibs. 214; God. 192; 2 Browne, 38; ex parte *Johnson*, 17 J. P. 438.
(*m*) *Anon.* Loff. 434.
(*n*) *R.* v. *Smith*, 5 Q. B. 614; 1 D. & M. 564.
(*o*) *R* v. *Gaskin*, 3 T. R. 206.
(*p*) *R.* v. *Davies*, 9 D. & R. 234.
(*q*) Ex parte *Johnson*, 17 J. P. 538.
(*r*) *R.* v. *Bluck*, Q. B. T. T. 1846, MS.

poverty of the applicant, unless it be clearly shown that he has from the first been in such a state of poverty as must have rendered it impossible for him to come to the court earlier (*a*).

His duty is to assist the minister and make responses in reading prayers, baptizing, marrying, burying, and the other divine offices, setting the psalms, &c., though his office be but a lay office (*b*).

By the latter part of canon 91 it is provided that parish clerks shall have and receive their ancient wages, without fraud or diminution, either at the hand of the churchwardens at such times as hath been accustomed, or by their own collection, according to the most ancient custom of every parish (*c*).

Instances have occasionally occurred in which the office of parish clerk has been held by a woman, the actual duties being performed by a deputy clerk (*d*).

As to the salaries, dues, &c., of clerks under the earlier Church Building Acts, who are in all cases to be chosen by the ministers of the respective churches (*e*), see 58 Geo. 3,

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(*a*) *R.* v. *Gifford*, Q. B. T. T. 1847, MS.

(*b*) Shaw's Par. Law, 55.

(*c*) That his salary may lawfully be paid out of the church rate, see *Kemp and Page* v. *Attenborough*, 30 L. T. 211. As to his suing in the ecclesiastical court for his customary salary, see *Parker* v. *Clerk*, Holt. 599; 3 Salk. 86; cases in K. B. 195; 1 Gib. 214.

(*d*) As to the power of a woman to fill parochial and other public offices, see *R* v. *Stubbs*, 2 T. R. 359, *ante*, p. 5; *Olive* v. *Ingram*, 2 Str. 1114, *ante*, p. 5. But *quære* whether the office of parish clerk can *lawfully* be held by a woman, as parish clerks were originally in holy orders, *ante* p. 144.

(*e*) By 59 Geo. 3, c. 134, s. 21, the clerk of every church and chapel built and appropriated under that Act, or 58 Geo. 3, c. 45, is to be *annually* appointed; and the appointment is to be made by the minister of such church or chapel, not by the incumbent of the parish in which it may happen to be situated: *Jack-*

c. 45, ss. 63, 64 ; 59 Geo. 3, c. 134, ss. 6, 10, 11 ; 5 Geo. 4, c. 103, s. 5 ; 1 & 2 Will. 4, c. 38, s. 16 (*f*).

With regard to the parish clerks and sextons of new parishes under "The New Parishes Acts," 6 & 7 Vict. c. 37, 7 & 8 Vict. c. 94, and 19 & 20 Vict. c. 104, it is enacted by section 9 of the last-named Act that they shall and may be appointed by the incumbents for the time being, and be by them removable, with the consent of the bishop of the diocese, for any misconduct.

There is no express provision about their salaries, but it is apprehended that they are payable out of the church rates (*g*).

By a recent statute, which has been already referred to (7 & 8 Vict. c. 59) (*h*), provision is made for the appointment of persons in holy orders to the office of church clerk, chapel clerk, or parish clerk, and for the performance by them, in respect of their office, of such spiritual and ecclesiastical duties as the incumbent, with the sanction of the bishop, may require. The 2nd section of the Act in

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son v. *Courtenay*, 8 E. &. B. 8. And his continuing in office in successive years without any express re-appointment will be construed to amount to a re-appointment in each year, *ib.* ; and see *R.* v. *The Inhabitants of the Township of Osset*, 13 Q. B. 957. That he cannot be removed during his year of office without cause, see also *Jackson* v. *Courtenay*, supra. The last-named case also decides that the possession of the church of a chapelry district under 59 Geo. 3, c. 134, s. 16, and 2 & 3 Vict. c. 49, s. 3, is in the minister of such church ; on which last point see also *Griffin* v. *Deighton*, 33 L. J. (N. S.) Q. B. 29 ; affirmed in error, *ib.* 181 ; and *supra*, p. 71, note (*c*).

(*f*) That the 10th sect. of 59 Geo. 3, c. 134, which vests the fees of the parish clerk and sexton, which shall thereafter arise in any district or division of any parish divided under the provisions of the 58 Geo. 3, c. 45, in the clerk and sexton respectively of such division, does not apply to *district chapelries*, see *Aulton* v. *Roberts*, 2 H. & N. 432.

(*g*) See 19 & 20 Vict. c. 104, s. 15.

(*h*) *Vide supra*, p. 146.

question provides, that when any vacancy shall occur in the office of church clerk, chapel clerk, or parish clerk, in any district, parish, or place, it shall be lawful for the rector or other incumbent, or other person or persons entitled to appoint or elect, if he shall think fit, to elect a person in holy orders of deacon or priest of the United Church of England and Ireland, to fill the said office of church clerk, parish clerk, or chapel clerk, and that such person so appointed or elected shall, when duly licensed as therein provided, be entitled to all the profits and emoluments of the office, and shall also be liable in respect thereof to perform all such spiritual and ecclesiastical duties within such district, parish, or place, as the said rector or other incumbent, with the sanction of the bishop of the diocese, may from time to time require ; but that such person in holy orders shall not, by means of such appointment or election, have or acquire any freehold or absolute right to, or interest in, the said office, or to or in any of the profits or emoluments thereof, but shall at all times be liable to be suspended or removed from the said office, in the said manner and by the same authority, and for such and the like causes, as those whereby any stipendiary curate may be lawfully suspended or removed.

By the 3rd section it is provided, that every such appointment or election, if made by any other person than the rector or other incumbent, shall be subject to the consent and approval of such rector or other incumbent, and that no person in holy orders so appointed or elected shall be competent to perform the duties of his office, or to take any of the profits or emoluments, unless and until he shall have obtained from the bishop of the diocese such license and authority in that behalf as are required and usual in respect of stipendiary curates, but that such license and authority, when obtained, shall entitle him to hold the

said office without any annual or other re-appointment or re-election thereto.

This statute has also effected another very desirable object, by removing the great inconvenience, which hitherto existed from the want of a sufficient ecclesiastical control over ordinary parish clerks, and from the difficulty of suspending them or removing them from their office, when the interests of religion or the welfare of the parishioners required it. By the 5th section it is enacted, "that if at any time it shall appear, upon complaint or otherwise, to any archdeacon or other ordinary that any person not in holy orders holding or exercising the office of church clerk, chapel clerk, or parish clerk, in any district, parish, or place, within and subject to his jurisdiction, has been guilty of any wilful neglect of, or misbehaviour in his said office, or that by reason of any misconduct he is an unfit and improper person to hold or exercise the same, it shall be lawful for such archdeacon or other ordinary forthwith to summon such church clerk, chapel clerk, or parish clerk, to appear before him, and also by writing under his hand, or by such process as is commonly used in any of the courts ecclesiastical for procuring the attendance of witnesses, to call before him all such persons as may be competent to give evidence or information respecting any of the matters imputed to or charged against such church clerk, chapel clerk, or parish clerk as aforesaid; and such archdeacon or other ordinary shall and may, if he see fit, examine upon oath, to be by him administered in that behalf, any of the persons so appearing or attending before him respecting any of the matters aforesaid, and shall and may thereupon summarily hear and determine the truth of the matters so imputed to or charged against such church clerk, chapel clerk, or parish clerk as aforesaid; and if upon such investigation it shall appear to the satisfaction of such archdeacon or other

ordinary that the matters so imputed to or charged against such church clerk, chapel clerk, or parish clerk are true, it shall be lawful for the said archdeacon or other ordinary forthwith to suspend or remove such church clerk, chapel clerk, or parish clerk from the said office, and by certificate under his hand and seal, directed to the rector or officiating minister of the parish, district, or place wherein such church clerk, chapel clerk, or parish clerk held or exercised his said office, to declare the said office vacant, and a copy of such certificate shall thereupon, by such rector or other officiating minister, be affixed to the principal door of the church or chapel in which the said church clerk, chapel clerk, or parish clerk usually exercised his said office ; and the person or persons who upon the vacancy of such office are entitled to elect or appoint a person to fill the same, shall and may forthwith proceed to elect or appoint some other person to fill the same in the place of the said church clerk, chapel clerk, or parish clerk, so removed as aforesaid : provided always, that the exercise of such office by a sufficient deputy who shall duly and faithfully perform the duties thereof, and in all respects well and properly demean himself, shall not be deemed a wilful neglect of his office on the part of such church clerk, chapel clerk, or parish clerk, so as to render him liable, for such cause alone, to be suspended or removed therefrom."

It will be observed that this statute does not affect the common law right of removal by the party appointing, who may still, it is apprehended, as before the statute, remove from the office for good cause.

The 6th and last section of this Act contains also a very valuable enactment. It provides for the summary removal of any person who, having ceased to be employed in any of the offices or duties in the Act mentioned or referred to, or having been duly suspended or removed from any such office or employment as aforesaid, shall at any time refuse

or neglect to give up the possession of any house, building, land, or premises, or any part thereof, by him held or occupied by virtue of such office or employment. The party offending may, in such case, be summoned before the bishop of the diocese, who is authorized to grant a certificate of these facts, under his hand and seal, to the person entitled to the possession of the premises, and upon the production of such certificate to a neighbouring justice of the peace, and proof of such wrongful retention as aforesaid, the said justice is required to issue his warrant for summarily removing him from the premises, and giving peaceable possession to the person entitled to the same.

The *sexton* is another inferior officer of the parish, appointed for the assistance of the churchwardens in the care of the church.

It was said by *Patteson*, J., in *R.* v. *Stoke Damerel* (*a*), that the right to appoint the sexton is by the general law in the minister of the parish; but in the subsequent case of *Cansfield* v. *Blenkinsop* (*b*) the Court of *Exchequer* doubted the correctness of this view. Where the duties of that office consist in the care of the sacred vestments and vessels, or the care of the church by keeping it clean, in ringing the bells, and in opening and closing the doors for divine service, they said the presumption is that the churchwardens have the right of appointment; and where the duties are confined to the churchyard, in digging graves, &c., the presumption is, that the appointment is in the incumbent; and where the office embraces both the above-mentioned duties, the presumption is that the right is vested in the churchwardens and incumbent jointly (*c*).

(*a*) 5 A. & E. 584; 1 N. & P. 453, S. C.
(*b*) 4 Exch. 234.
(*c*) As to its being part of the duty of the sexton to dig graves, see *R.* v. *The Inhabitants of Liverpool*, 3 T. R. 118; and see *post*, p. 155, notes (*g*) and (*h*).

That the appointment of sexton is not in the parishioners at common law is clearly settled (*a*), but it may be and frequently is vested in them by custom (*b*). So the lord of a manor, or reputed manor, may prescribe to the right of appointing the sexton of a parish church as appurtenant to the manor (*c*).

Like the parish clerk, he is considered as a *lay* officer, having a freehold in his office, and if improperly removed, may be restored by *mandamus* (*d*); but a custom for the parishioners to remove him at *pleasure* is good (*e*).

In like manner, and for the same reason, though liable to spiritual censures, he cannot be deprived by the *Ecclesiastical Court* (*f*).

His business is to keep the church and pews cleanly

(*a*) *Cansfield* v. *Blenkinsop*, 4 Exch. 234; and see *R.* v. *The Inhabitants of Liverpool*, supra.

(*b*) See Shaw's Parish Law, 27; Steer's Parish Law, 102; *Ile's case*, 1 Vent. 153; *R.* v. *Churchwardens of Thame*, Str. 115; *R.* v. *Churchwardens of St. James's, Taunton*, 1 Cowp. 413; *R.* v. *Stoke Damarel*, 5 A. & E. 584. And the custom may be to dismiss at pleasure: *R.* v. *Churchwardens of Thame*; *R.* v. *Churchwardens of St. James's, Taunton*, supra.

(*c*) *Soane* v. *Ireland and others*, 10 East, 259.

(*d*) *R.* v. *Kingsclere*, 2 Lev. 18; *Ile's case*, 1 Vent. 153, S. C.; Ex parte *Johnson*, 17 J. P. 538. In *R.* v. *The Churchwardens of Thame*, supra, *Fortescue*, J., is reported to have said—"We ought not to grant a *mandamus* without a certificate that the sexton was chosen for life." In the case from Levinz and Ventris above referred to such a certificate was given; and in ex parte *Johnson*, supra, there was affirmative evidence that the appointment was for life.—But it is said in the report in Levinz that in the same term a *mandamus* was granted without such certificate; and in the precedent of a *mandamus* to restore to the office of sexton given by *Wentworth*, see vol. 6, p. 349, there is no allegation that the appointment was for life.

(*e*) *R.* v. *Churchwardens of St. James's, Taunton*, 1 Cowp. 413; *R.* v. *Churchwardens of Thame*, 1 Str. 115.

(*f*) 2 Roll. Abr. 235; Bac. Abr. *Mandamus* (C). The power of suspension and removal conferred upon the ordinary by 7 & 8 Vict. c. 59, is confined to the case of parish *clerks*, and does not apply at all to the case of a parish *sexton*.

swept, and sufficiently dried ; to make graves and open the vaults for the burial of the dead ; to provide, under the churchwarden's directions, candles, &c., for lighting the church, bread and wine and other necessaries for the communion, and also water for baptizing ; to attend the church during divine service, in order to open the pew doors for the parishioners ; to keep out dogs, prevent disturbances, &c. (*g*).

It is also part of the duty of the sexton to toll the bell for the burial of parishioners buried in the churchyard (*h*).

As the duties of the sexton are ministerial only, he may delegate the performance of them to a deputy (*i*).

His fees are ordinarily settled by the parish vestry, and

(*g*) See Shaw's Parish Law, 57. As to its being the duty of the sexton, as such, to dig graves, see the language of Lord *Kenyon,* in *R.* v. *The Inhabitants of Liverpool,* 3 T. R. 118. The learned judge says, " There is no doubt but that part of the office of *sexton* consists in digging graves ; this is different from that of the *sacrist,* which is an office scarcely known since the Reformation, except in some of the cathedrals, whose duty it is to take care of the sacred vestments ;" And see also, *The Burial Board of the Parish of St. Margaret, Rochester* v. *Thompson,* 6 C. P. 445. L. R. ; and *Gell* v. *The Mayor, &c., of Birmingham,* 10 L. T. (N. S.) 497.

(*h*) *The Burial Board of the Parish of St. Margaret, Rochester* v. *Thompson,* supra. In this case it was decided that the sexton has a right, against the consent of the burial board, to enter and dig the graves in the consecrated ground for the burial of deceased parishioners, and to toll the bell in the consecrated chapel of the burial ground at such burial, such tolling of the bell being part of the burial rite of the Church of England, and the digging of the graves and the tolling of the bell being duties which the sexton is bound to perform in the parish churchyard ; and see further as to the duties of parish sextons, *Cansfield* v. *Blenkinsop* 4 Exch. 234; and *R.* v. *The Churchwardens of Kingsclere,* 2 Lev. 18, where it was said, *arguendo,* that the duty of the sexton is to ring the bells and dig the graves.

(*i*) *The Burial Board of the Parish of St. Margaret, Rochester* v. *Thompson,* supra.

paid by the churchwardens (*a*). He is also in some parishes entitled to certain accustomed dues.

The office of sexton may be held by a woman, and women may vote at the election of a sexton (*b*).

As to the salaries, &c., of sextons, under the earlier Church Building Acts, see 59 Geo. 3, c. 134, ss. 6, 10, 11 ; 5 Geo. 4, c. 103, s. 5 ; 1 & 2 Will. 4, c. 38, s. 16.

As to sextons under "The New Parishes Acts," see 19 & 20 Vict. c. 104, s. 9 (*c*).

It may be observed here that by section 9 of the Vestry Act (*d*) it is enacted, that nothing in that Act contained shall extend to any parish within the city of London ; and by section 10, that nothing in that Act contained shall extend to any parish in the borough of Southwark.

It is, however, believed that most, if not all, the parishes within the city of London and the borough of Southwark were at the time of the passing of the Vestry Act regulated by select vestries.

It should be further stated that by section 1 of the Metropolitan Local Management Act (18 & 19 Vict. c. 120), Sir *John Hobhouse's Act* (1 & 2 Will. 4, c. 60) was repealed so far as regards any parish mentioned in either of the schedules (A) and (B) to the first-named Act, except as to any vestry and auditors already elected for any such parish, who were to continue to act as such vestry and auditors under such Act until the first election of vestrymen and auditors under the said Metropolis Local Management Act, but no longer.

The vestries of the parishes mentioned in the schedules (A) and (B) of the said Metropolis Local Management Act, which include the several parishes within the city of

(*a*) See Shaw's Parish Law, 57; *Kemp and Page* v. *Attenborough*, 30 L. T. 211.
(*b*) *Olive* v. *Ingram*, 2 Str. 1114. Vide *ante*, p. 5.
(*c*) *Supra*, p. 149.
(*d*) 28 Geo. 3, c. 69.

London and borough of Southwark, are now constituted and regulated by that Act and the Metropolis Local Management Amendment Act (19 & 20 Vict. c. 112) (*e*).

It is provided by section 1 of the last-named Act, that where at the time of the passing of 18 & 19 Vict c. 120, the power of making church rates, or rates of the nature of church rates, in any parish was vested in any open vestry, or in any meeting in the nature of an open vestry meeting, or in any meeting of the parishioners, inhabitants, or ratepayers generally, or of such of the parishioners, inhabitants, or ratepayers as were rated at or above any specified amount or value (whether such vestry or meeting were holden for the parish at large or for any liberty or other district therein), such power shall not be deemed to have become vested in the vestry constituted in such parish under the said Act, but shall be exercised as if the said Act had not been passed; and by section 2, that nothing in the said Act or this Act shall affect or be deemed to have affected any power of electing or appointing churchwardens or making church rates, or other power which, at the time of the passing of the said Act, was vested in any such open vestry or meeting as aforesaid, or any elected or other vestry, where such vestry or meeting acts exclusively for any district (by whatever denomination distinguished) created for ecclesiastical purposes only.

Section 3 enacts that, "Save as hereinbefore otherwise provided, all the duties, powers and privileges (including such as relate to the affairs of the church or the management or relief of the poor) which might have been performed or exercised by any open or elected or other vestry, or any such meeting as aforesaid, in any parish under any

(*e*) The Metropolis Local Management Act has been further amended by 21 & 22 Vict. c. 104 and 25 & 26 Vict. c. 102.

local Act or otherwise, at the time of the passing of the said Act of the last session, shall be deemed to have become transferred to and vested in the vestry constituted by such last-mentioned Act, except so far as any such duties, powers or privileges may, in the case of a parish included in any district mentioned in schedule (B) to the said Act, be vested by section 90 thereof in the board of works of such district: provided that all duties and powers relating to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor, which at the time of the passing of the said Act were vested in or might be exercised by any guardians, governors, justices or commissioners, or any body other than any open or elected or other vestry, or any such meeting as hereinbefore mentioned, shall continue vested in and be exercised by such guardians, governors, trustees, or commissioners, or other body as aforesaid."

And with regard to the notices of vestry, it is provided by section 9 of the said 19 & 20 Vict. c. 112, that "Every meeting of any vestry constituted by the said Act, 18 & 19 Vict. c. 120, of which and of the special purpose whereof notice is now by law required to be affixed on or near the principal doors of the churches and chapels within the parish, may be convened by transmitting through the post or otherwise notice, signed by the clerk to the vestry, to each vestryman at his usual or last known place of abode in England, of the place and hour of holding the same, and the special purposes thereof, three days before the day appointed for such meeting; and also by affixing at the same time notice thereof on or near the door of any building where the said meeting is to be holden, and it shall not be necessary that notice of any such meeting shall be further or otherwise signed or published."

In the case of *Carter* v. *Cropley* (*a*), before Vice-Chancellor *Kindersley*, an important question was raised on the effect of these Acts, which it may be well to mention here. The advowson of the parish of St. James, Clerkenwell, was vested in trustees to and for the only use, benefit and behoof of the parishioners and inhabitants of the said parish and their successors for ever; the right to elect the incumbent had by a decree of the Court *of Exchequer* been declared to be in the parishioners and inhabitants paying towards the rates and assessments to the church and poor. The Vice-Chancellor held that this right was by virtue of the 3rd section of 19 & 20 Vict. c. 112, transferred to the newly constituted vestry under the Metropolitan Improvement Acts, and he refused, with costs, a motion for an injunction to restrain the said trustees and vestry from presenting to the bishop for induction, and the bishop from inducting into the living the clerk who had been elected to it by the said vestry. But this judgment was reversed on appeal to the *Lords Justices*, on the ground that the "duties, powers and privileges" mentioned in that section relate to the same matters as the "duties, powers and authorities" mentioned in the 90th section of 18 & 19 Vict. c. 120, and did not apply to a right of presentation to a church (*b*).

It should be further observed that it is provided by the 8th section of 58 Geo. 3, c. 69, that nothing in that Act contained shall extend or be construed to extend to alter the time of holding any vestry, parish, or town meeting,

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(*a*) 5 Week. Rep. 172; and see 26 L. J. Ch. 249 (*n*).

(*b*) *Carter* v. *Cropley*, 26 L. J. Ch. 246, and see *Attorney-General* v. *Drapers' Company*, 4 Drew, 299. See further as to the powers of the vestry under the Metropolis Local Management Acts, *Vaughan* v. *Imray*, 1 E. & E. 633; *The Ecclesiastical Commissioners* v. *The Vestry of Clerkenwell*, 31 L. J. Ch. 454; *R.* v. *Stretfield and Dixon*, 32 L. J. M. C. 236.

which is by the authority of any Act required to be holden on any certain day, or within any certain time in such Act prescribed and directed; nor shall any thing in that Act contained extend to take away, lessen, prejudice, or affect the powers of any vestry or meeting holden in any parish, township, or place, by virtue of any special Act or Acts, or any ancient and special usage or custom, or to change or affect the right or manner of voting in any vestry or meeting so holden (*a*).

And lastly, it must be borne in mind that the vestry Acts apply only to parishes and places having separate overseers of the poor, and maintaining their poor separately (*b*).

They do not therefore apply to parishes or other districts created under the Church Building Acts for ecclesiastical purposes only, except where and to the extent that they may be made applicable by the provisions of the statute regulating the proceedings of the district vestry, as it is submitted they are, so far as regards the notice of vestry, in the case of the appointment of churchwardens under the provisions of 8 & 9 Vict. c. 70, s. 6, for the church of a district chapelry or consolidated chapelry, which is to take place "at the usual time of appointing parish officers at a meeting to be summoned in all respects as if such district were a parish, and such meeting a parish vestry meeting."

In the case of *The Queen* v. *Barrow and others* (*c*), the question was as to the validity of the notice of vestry for the election of churchwardens for one of such ecclesiastical parishes or districts. The vestry was held on Easter Tuesday, the notice of holding it having been given by

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(*a*) See the observation of *Erle,* J. in In re *the Churchwardens of St. Faith,* 25 L. J. (Q. B.) 168.
(*b*) *R.* v. *Barrow,* 4 Q. B. 577. L. R.
(*c*) 4 Q. B., L. R. 577.

posting it on the church door on the preceding Good Friday, and this was in accordance with the practice which had prevailed during the last thirty years. It was held that the case was not within Sturges Bourne's Act (58 Geo. 3, c. 69), that all that was necessary was that there should have been a reasonable notice, and that under the circumstances the notice given was reasonable.

Before concluding this section it may be well to remark that the proceedings of a vestry cannot be invalidated by the non-observance of any of those forms which regulate the proceedings of other assemblies; and that it is sufficient to render the vestry proceedings legal and binding, if the parties assembled understand what is intended to be done, and assent to it (*d*).

The recent cases of Ex parte *Stevens*, In re *The Vestry of the Parish of Hammersmith* (*e*); *the Queen* v. *Roberts and another, Justices of Surrey and Richard May* (*f*), and *Tiarks and Fenning* v. *Hutton* (*g*) may be referred to here in illustration of this principle.

The case of Ex parte *Stevens* (*e*) was as follows :—At a meeting of the inhabitants in vestry, held under a local Act, for the purpose of determining the application to some public purpose beneficial to the inhabitants of money paid by two railway companies in compensation of certain commonable rights of the inhabitants, a proposition was made that the money should be applied partly to a district church and partly to almshouses. The proposition was met by an amendment to the effect that the money be applied to almshouses only. The chairman having inquired whether anyone

(*d*) See the observations of several of the judges in *Gosling* v. *Veley* (in error), in Dom. Proc. 4 House of Lords' Cases, 679; 17 Jur. 939; and also those of Lord Truro in the same case. See also Mr. Attree's edition of this case.

(*e*) 16 J. P. 632; 3 B. & S. 504. note (*a*).

(*f*) 32 L. J. M. C. 153. Reported also in 3 B. & S. 495.

(*g*) 35 L. J. Ec. 11; 1 Ec. 270. L. R.

else wished to address the meeting, and no third proposition having been made, the amendment was put and carried by a show of hands. A poll was then demanded, and was taken at one and the same time for the motion and for the amendment, the inhabitants being called on to vote "for the district church and almshouses," [or, "for the almshouses only." The result was in favour of the proposition for the district church and almshouses. It was held that the vestry must be taken to have agreed that the money should be applied in one of the two methods proposed, and that the poll was rightly taken, it being so taken as to determine the question which of these two methods was preferred by the majority of the parishioners.

The case of *The Queen* v. *Roberts and another* (*a*), was as follows :—The churchwardens of a parish gave notice that a vestry would be held on a given day to make a rate for the purpose of repairing the fabric of the parish church—that a show of hands would be taken upon each proposition and amendment which might be submitted to the meeting—that if a poll should be demanded the meeting would be adjourned to the 8th of July, when the poll would be taken on all the propositions and amendments made at such meeting at one and the same time—that the poll would be kept open till, &c., when the poll would close and the result should be final and conclusive. At the first meeting a rate of 2*d.* in the pound was proposed, and an amendment was moved that no rate should be granted : on a show of hands the majority were in favour of the amendment, and on a poll being demanded the meeting was adjourned, and the poll taken on the day named upon the motion and amendment at the same time. At the close of the poll the chairman declared that there was a majority in favour of

(*a*) 32 L. J. M. C. 153. Reported also in 3 B. & S. 495.

the motion, whereupon a voter proposed to move another amendment, but was not allowed to do so. It was held that, the amendment being in fact a negative of the original motion, there was no occasion to put the motion separate to the meeting—that the proceedings were regular and the rate good, and that the chairman was right in refusing to allow the subsequently proposed amendment to be put. *Cockburn*, C. J., in giving judgment said "Then, as to the mode in which the poll has been taken ; I cannot see that any objection was made by any one of the parishioners as to the way it was to be taken. A rate of 2*d.* in the pound was proposed and the proposition might be carried affirmatively, and any one might move a negative if he chose to do so. The amendment which was moved was really and practically a negative of the original motion, and not an intermediate matter at all. No one moved that the rate should be made at a lower figure, and when the poll was taken there appeared a majority in favour of the rate. It would be in the highest degree inconvenient if, when all the propositions had been before the meeting, some one should propose something which would practically have the effect of perverting the purpose for which the meeting was called. If there was any objection, it ought to have been made before the poll was taken." And *Crompton*, J., said, "I entirely agree, and will only add, that I assent to the way of taking the poll which we approved in Ex parte *Stevens*" (*b*).

(*b*) 16 J. P. 632; 3 B. & S. 504, note (*a*); and see the report of *R.* v. *Roberts*, in 3 B. & S. 495, and especially the judgment of *Cockburn*, C. J., as given in that report. The Chief Justice is therein reported to have said, "According to the general practice all propositions should be submitted to the parishioners before they go to the poll; and it would be highly inconvenient if, in the case of a large body of persons, such as the rated inhabitants of a parish, after the polling had taken place, upon the

In *Tiarks and Fenning* v. *Hutton* (*a*), after it had been moved and seconded that a rate should be made an amendment was proposed that it was not legal or expedient to make a church rate for the district; the amendment and afterwards the original motion were put to the meeting, and the original motion was carried; a poll was then demanded on the amendment only. The votes were taken for the amendment and against the rate on one side, and against the amendment and for the rate on the other side. The chairman declared the result of the poll to be "for the amendment and against the rate, 78 votes—against the amendment and for the rate, 146 votes;" and then dissolved the meeting without again putting the original motion. It was held by Dr. *Lushington* that though the proceedings were irregular, the irregularity was not sufficient to vitiate the rate.

This principle has been further illustrated by the still more recent case of *R.* v. *Stephens, Chancellor of Bangor* (*b*). In that case the rector, who claimed the right to appoint both churchwardens, at a vestry meeting called for the election of churchwardens refused to put from the chair a resolution which had been duly moved and seconded for the election of a parishioners' churchwarden. It was thereupon moved, seconded, and carried, that another vestryman should take the chair, which he assumed to do, and under whose assumed chairmanship the parishioners' candidate was elected churchwarden by the vestry. All

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propositions before the meeting, any person might propose a fresh amendment, and another poll should be taken upon that, and so on *ad infinitum;* the business of the parish could not practically be carried on."

(*a*) 35 L. J. Ec. 11; 1 Ec. 270. L. R.

(*b*) T. T. 1870, M.S. The author, who was one of the counsel in the case, is not aware of any report of it.

this was done againt the protest of the rector, who refused to leave the chair, retained his seat during the proceedings, and subsequently closed the vestry. The chancellor having refused to admit the parishioners' churchwarden, an application was made to the Court of *Queen's Bench* for a *mandamus* to the chancellor to admit him to the office. It was argued at the hearing that the rector remained chairman, and had a right to be so (*c*), and that the appointment of the substituted chairman vitiated the proceedings: but the Court held that the proceedings were not vitiated by the assumed election of another chairman in place of the rector, and that there had been in substance an election of a churchwarden by the vestry; and they made the rule for a *mandamus* absolute.

It should be added that by the 27th section of 20 & 21 Vict. c. 81, "An Act to amend the Burial Acts," it is provided that no resolution or proceeding of any vestry, or meeting in the nature of a vestry, for the purposes of the Acts therein recited, and that Act, or any of them, shall be void or voidable by reason of any defect or irregularity of or in the notice of such vestry or meeting, or any other error or form in the calling of such vestry or meeting, or in the proceedings thereat, unless notice in writing of such defect or irregularity or error shall have been given at such vestry or meeting, or within seven days after the day of the holding thereof, to the churchwardens or other persons to whom it belongs to call meetings of such vestry, who shall thereupon call another meeting for the purpose of considering the previous resolution or proceeding or the matter thereof; "and no such resolution or proceeding

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(*c*) *Wilson* v. *McMath*, 3 B. & A. 241; 3 Phil. 87; *R.* v. *D'Oyly, D. D.*; 12 A. & E. 139; 4 P. & D. 52, S. C. *ante*, p. 109.

made or taken at any such vestry, or such meeting in the nature of a vestry, before the passing of this Act, which shall not have been objected to by notice in writing to such churchwardens or persons as aforesaid, shall be deemed invalid by reason of any such defect, irregularity or error.

It may also be mentioned here that a ratepayer has no general right to inspect and take extracts from the churchwardens' books of accounts; to enable him to do so, some special and public ground must be shown (*a*).

It may be well also just to direct attention to the sixth section of the Vestry Act (58 Geo. 3, c. 69), which provides for the custody and preservation of parish books and papers (*b*).

And, finally, it should be borne in mind that if it should become necessary to apply for a *mandamus* to take a poll, the application for the *mandamus* and the affidavit upon which it is made respectively, must be made by some peron who has an interest in the result (*c*).

SECTION IV.

Of granting the Rate, making the Assessment, and of getting the Rate confirmed by the Ordinary.

The vestry having been duly assembled, and the minister having taken the chair (*d*), or in his absence, a chairman having been duly appointed by plurality of votes (*e*), the next step is for the churchwardens to submit to the vestry for

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(*a*) Ex parte, *Briggs*, 1 E. & E. 881; and see *May* v. *Gwynne*, 4 B. & A. 301.

(*b*) See the section at length in the Appendix.

(*c*) *R.* v. *Frost*, 8 A. & E. 822; Ex parte, *Graves*, re *The Mayor of Peterborough*, 58 *Law Times*, 287. S. C. *nom. R.* v. *Mayor of Peterborough*, 44 L. J. Q. B. 85.

(*d*) *Wilson* v, *M'Math*, 3 B. & A. 248.

(*e*) 58 Geo. 3, c. 69, s. 2.

their consideration the question of the proposed repairs, and the estimates of the probable costs necessary for effecting them.

The churchwardens are bound to furnish this estimate, and if they neglect to do so, the vestry may refuse to enter upon the question of church rates at all (*f*); but of course a *probable* estimate of the expenses is all that can be required of them, for they cannot be expected beforehand to ascertain the exact sum which may be wanted.

The probable sum required for the rate having been brought under the notice of the vestry, it will be open to the churchwardens, or indeed to any vestryman present, to move that the requisite amount be raised by means of an equal rate to be levied upon the ratable property of all the parishioners (*g*).

The parishioners are not, however, bound by the estimate of the churchwardens; for estimates may easily vary, and they have a right to investigate this matter for themselves; they are the sole judges of the *quantum* of the rate required, and may support any amendment that may be moved varying the amount to be raised, provided they act *bonâ fide*, and do not obstinately and pertinaciously refuse to make a rate, or grant one manifestly collusive or inadequate (*h*). But if

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(*f*) *R.* v. *St. Margaret's, Leicester*, 10 A. & E. 730; 2 P. & D. 510, S. C. See also *Smith and Willis* v. *Dixon*, 2 Curt. 264; *Medland and Brown* v. *Paine*, 4 Jur. (N. S.) 1223; 7 Week Rep. 357.

(*g*) It is not absolutely necessary that this should be done in vestry; the parishioners in vestry assembled may, if they please, delegate the power of making a rate to a number of persons nominated for that particular purpose, but in that case it is desirable that those persons should report to the vestry, and get their report confirmed. *Still and Bunn* v. *Palfrey*, 2 Curt. 902; 1 N. E. C. 220. As to the power of the vestry to delegate their authority to a committee, see also *The Queen* v. *The Vicar, Churchwardens, and Inhabitants of St. Stephen's, Coleman Street*, 14 L. J. Q. B. 34.

(*h*) *Greenwood* v. *Greaves*, 5 Hagg. Ecc. 831.

the church be out of repair, and a rate be in fact necessary, it will be their duty to grant one (*a*) ; they are assembled in vestry for that purpose, and have no right to evade the question by any such proposal as that the meeting be adjourned until that day six months—that church rates are objectionable in principle—or the like. If any such amendment be proposed, it should be met on the part of the chairman by a firm refusal to take the sense of the meeting upon it, for in all meetings assembled to deliberate and vote on the performance of a definite duty, the chairman or president has always been considered as charged to exclude irrelevant motions, and to admit only voting upon such as are within the purpose and competency of the meeting (*b*).

Upon the rate being granted the next step will be to assess the parishioners according to their several properties ratable, and the making of this assessment belongs peculiarly to the parties themselves in vestry assembled. All who are interested ought then and there to attend, and the presumption of law is strongly in favour of the assessment so made (*c*).

It is not, however, necessary that this should be done in vestry. The foundation for the rate is the resolution of vestry that the rate shall be made, and the churchwardens

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(*a*) *Burder* v. *Veley*, 12 A. & E. 233 ; 4 P. & D. 452, S. C. ; *Gosling* v. *Veley, and another*, 7 Q. B. 406, *post*, c. 3, s. 3 ; *Gosling* v. *Veley and Joslin* (in error), 19 Q. B. 111 ; S. C. in Dom. Proc., 4 House of Lords' Cases, 679 ; 16 Jur. 939.

(*b*) See *Gosling* v. *Veley and another*, 7 Q. B. 466; and see c. 3, s. 3. See, however, *Gosling* v. *Veley* in Dom. Proc. *supra*. It is submitted that the course above pointed out is still the proper course for the chairman to adopt, notwithstanding "the "Compulsory Church Rate Abolition Act, 1868."

(*c*) *Lee and Parker* v. *Calcraft*, 3 Pil. 640 (*n*); *Watney* v. *Lambert and Simpson*, 4 *Hagg.* 84.

may subsequently, of their own authority, assess the rate in pursuance of such resolution (*d*); and if they make the rate for any purpose not authorized by the resolution, although it be one to which church rate is applicable, the rate will be bad (*e*).

Nor is it necessary that the heading should be written in vestry, or even at the time when the assessment is made; it may be written even after confirmation (*f*), and may, as it would seem, be amended at any time before proceedings are actually taken to recover the rate (*g*).

As was before remarked, it is laid down in some of the old books that two rates should be made; the one for the repairs of the fabric of the church, which is said to be real, charging the lands and not the person; the other for the ornaments and incidental expenses, which is said to be personal, charging the goods and not the land (*h*). But Sir *Simon Degge* denies this to be law, and says that he hath seen a report under the hand of Mr. *Latch*, that it was resolved in *Willymott's case*, H. 6 Ja. 1, and in *Chester's case*, in the 10 Ja., that a foreigner that held lands in another parish wherein he did not reside, was as much chargeable to the ancient ornaments of the church, as bells, seats, and the like, as those that lived in the parish; but that such landholders should not be charged to new bells, organs, or such like; and that Mr. *Bulstrode* (*i*) reports a case about the same time, that the Chief Justice *Fleming* and Mr.

(*d*) *White and Jackson* v. *Beard*, 2 Curt. 480; *R.* v. *Crook*, Q. B. sittings after H.T. 1857.

(*e*) *R.* v. *Crook*, supra.

(*f*) See *R.* v. *Byrom and another*, 12 Q. B. 321. But the safer course is to have the assessment and heading either made by the vestry or confirmed by them. See *ante*, p. 167, n. (*g*).

(*g*) *White and Jackson* v. *Beard*, supra.

(*h*) See Gibs. Cod. 220; 2 Roll. Abr. 291; Prid. 70.

(*i*) See 1 Bulst. 20.

Justice *Williams* were of the same opinion, and gave this reason, that the foreigner might come to church if he pleased (*a*).

So, also in *Woodward* v. *Makepeace* (*b*), it was resolved that the plaintiff was an inhabitant where he occupied land, as well as where he personally resided ; and that although he doth not personally live in the parish, yet by having lands in his hands he is taxable ; and whereas it was pretended that the bells, for the recasting of which the rate was imposed which he had refused to pay, were but ornaments, *Holt*, C. J., said "if he be an inhabitant as to the church, which is confessed, how can he not be an inhabitant as to the ornaments of the church ?"

Prideaux also inclines to this latter opinion, citing a constitution of *John Stratford, Archbishop of Canterbury*, A.D. 1342, in support of it (*c*), and observes that the practice generally goes according to this opinion, and that the *ecclesiastical* judges, as well as the *temporal*, for the sake of the ease and convenience which accrue from the making of one levy for all, give countenance hereto, and begin to treat the law to the contrary (if it were law) as obsolete and out of date (*d*).

It is believed that the practice of making one church rate do for all purposes is now universal and well established (*e*).

Upon this well-recognized principle the judgment of Dr. *Lushington* in *Chesterton and Hutchins* v. *Farlar* (*f*), as to the liability of the inhabitants of a *district* parish under

(*a*) See Degge's P. C. p. 1, c. 12.
(*b*) 1 Salk. 164.
(*c*) Prid. 76, 77.
(*d*) *Id.* 76, 78.
(*e*) See Shaw's Par. Law, 92.
(*f*) 1 Curt. 347.

58 Geo 3, c 45, s 71, to contribute to the incidental expenses of the *mother church* seems to a great extent to have been based.

In that case the defendant was libelled by the churchwardens of the parish of *Saint Mary Abbots, Kensington*, for non-payment of a church rate.

An allegation was brought in, on behalf of Mr. *Farlar*, by way of defence, to the following effect :—

"That in the year 1823, the population of the parish of *Saint Mary Abbots, Kensington*, having greatly increased, a portion thereof was, under the authority of an Act of parliament, passed in the 58th year of the reign of His Majesty King George the Third, intituled '*An Act for Building and promoting the Building of additional Churches in Populous Parishes*,' and other Act or Acts of parliament, passed subsequent thereto, formed into a district parish for ecclesiastical purposes, and the bounds and limits of such district parish were prescribed and defined, as by law directed, by the title or description of the *Brompton District;* that a new church was erected within the limits of such district parish, under the provisions of the said Act or Acts of parliament ; and on the 6th day of June, 1829, such church was duly consecrated by the title of the Church of the Holy Trinity of the said Brompton district parish. That from and after such consecration of such district church it became by law a district church for all ecclesiastical purposes, and from such time the persons inhabiting such district parish are liable only to contribute to the *repairs* of the old church of *Saint Mary Abbots, Kensington*, and were not, and are not liable to contribute to any rate made for payment of expenses incident to the performance of divine worship in the said old church. That notwithstanding the premises the said church rate was made, as well for the repairing, cleansing, preserving,

supporting, and maintaining the said church, as for indemnifying the said *Charles Chesterton* and *Samuel Hutchins* from all costs and expenses to which they might be put touching their office of churchwardens; and they the said *Charles Chesterton* and *Samuel Hutchins* have, out of the proceeds of the said rate, paid and discharged divers sums of money to a considerable amount, incident to the performance of divine service in the said parish church, &c."

And per Dr. *Lushington:* "This article raises the question, whether the inhabitants of the *district* are liable to the expenses of the churchwardens of the *parish*; the inhabitants of every part of the parish, howsoever divided, are bound to contribute to the maintenance of the parish church, and all legal expenses incident thereto; but there are exceptions admitted by law, and in the present case, whether such exceptions exist or not depends on the Church Building Acts. The 71st section of the 58 Geo. 3, c. 45, expressly enacts, that, '*the district shall remain subject for twenty-years, to be accounted from the day at which the district church or chapel shall be consecrated, to the repair of the original parish church, and be deemed part of the original parish for all purposes of such repairs, and the making and levying of rates for that purpose.*' I think that, according to the construction of this clause, the inhabitants of the district are liable to be assessed to the *incidental expenses*, precisely in the same manner as to the *repairs* of the mother church. *Indeed, were it otherwise, the necessary consequence would be great inconvenience and confusion*" (*a*).

(*a*) See also *R.* v. *The Official Principal of the Consistorial Court of London*, re *Adams and another* v. *Beale*, 2 B. and S. 359; ex parte *Beale*, 12 C. B. (N. S.) 220, in which cases it was held that a rate for the "repairs" of a district parish church made under the 70th section of 58 Geo. 3, c. 45, might legally be made, partly for the purpose of defraying the expenses

According to the ecclesiastical law that hath obtained in this realm, the laying of the church rate ought to be according to the lands and the stock which the parishioners have within the parish ; but this is not to be understood as if any one were to be laid for both land and stock. They who made the rate might lay him according to either of the two, and even for the best of them, but not for both (*b*).

But the general usage now is to make a rate according to the value of the lands. However, it is to be taken notice of that this rate is only a personal, not a real charge ; for it is not laid upon the lands, but only upon the persons in respect of the lands which they occupy within the parish ; and for this reason the farmer or occupier, and not the landlord, is to pay the same (*c*).

And what is here said of the lands is to be understood also of houses ; for both, according to their value, are chargeable to these rates. And in some places houses only, as in cities and large towns, where there are houses only, and not lands to be charged thereto (*d*).

And if a parish plead a custom for the rate to be laid only for lands, and not for houses ; or to be laid only for arable land, and to be excused for their pastures ; or to be laid only for their sheep-walks and not for the rest ; the custom cannot be good, for by the law all lands and houses are to be equally rated ; and their paying for some part can be no good cause for the discharge of the rest (*e*).

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of the repair of the fabric of the church, and partly for the purpose of defraying the expenses incident to the celebration of divine worship, and incident to the office of churchwarden.

(*b*) Prid. 73.

(*c*) *Id.* See also the observations of Sir *S. Lushington* in *White and Jackson* v. *Beard*, 2 Curt. 480.

(*d*) Prid. 74.

(*e*) *Andrews* v. *Hutton*, Hetl. 130 ; Latch, 203 ; God. c. 12, s. 22 ; Prid. 83.

The rate is to be laid upon every occupier of land in the parish, although such occupier live in another parish; for in judgment of law every one who holds lands within the parish is a parishioner liable to the tax (*a*).

But a person cannot be charged in the parish where he inhabits for land which he has in another parish (*b*).

And when the lands are in farm, not the lessor but the tenant shall be rated and pay (*c*).

Even where, as formerly, under the Small Tenements Act (13 & 14 Vict. c. 99), and now in certain cases under "The Poor Rate Assessment and Collection Act, 1869" (32 & 33 Vict. c. 41), the landlord is ratable to and liable to pay the poor rate, the occupier is nevertheless the proper party to be assessed to the church rate (*d*).

Although the prevalent usage is to levy church rates upon lands and tenements only, it has been decided by the *Court of Delegates*, that *stock-in-trade* is liable to be rated for the payment of church rates in a parish where it has been usual to include stock-in-trade in the rate (*e*).

In order to render stock-in-trade liable, it is sufficient if it has been shown that it has been usual to rate it. It is not necessary to show an *immemorial custom* in the strict meaning of the term (*f*).

The following rules may be laid down for the guidance of the churchwardens and the vestry, as comprising in

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(*a*) Degge, 166; *Woodward* v. *Makepeace;* 1 Salk. 164. See also the judgment of Lord *Tenterden* in *R.* v. *Millard*, 4 B. and C. 778.

(*b*) 2 Roll. Abr. 282.

(*c*) Gibs. 221.

(*d*) *Richardson*, app., v. *Gladwin and Gooday*, resps., 1 E. & E. 138; and see *Chesterton and Hutchins*, v. *Farlar* 1 Curt. 347; *Farlar* v. *Chesterton and Hutchins*, 2 Moore, P. C. 330.

(*e*) *Miller* v. *Bloomfield*, 1 Add. 499; and see *Medland and Browne* v. *Paine*, 4 Jur. (N.S.) 1283; 7 Week. Rep. 357.

(*f*) *Miller* v. *Bloomfield*, supra.

general terms the law upon this subject, as collected from the cases, and the most authentic text books :—

1. The charge is on the person in respect of the land.

2. The owners of lands residing in the parish where the lands are situate are liable in respect of the lands in their own occupation.

3. The owners of lands, not resident, if they occupy the lands, and also non-resident occupiers, are liable to the rate in respect of the land they occupy.

4. Where owners do not occupy their lands, nor reside, they are not subject to the rate, but the rate shall be upon their lessees or other occupiers of their lands (*g*).

When, therefore, a church rate is to be made, all that occupy any lands or houses within the parish are to be laid to it, according to the value of the said lands or houses, by an equal pound rate, and not according to the quantity of the land (*h*), without giving or overcharging one or sparing or easing another, or leaving any out of the rate who ought to be charged to it (*i*).

But if a parish consists of several vills, and there is a custom to levy the rate in certain proportions, they must pursue it, for such a custom may be, or may have been in its commencement, reasonable (*k*).

But a custom for a particular vill or township to contribute to the rate, without its inhabitants being summoned to the vestry, is illegal, and cannot be sustained (*l*).

Primâ facie all property of this description is liable, unless there be some legal ground of exemption (*m*).

(*g*) See Swan's Church Repairs, p. 32.
(*h*) Wood's Inst. b. i. c. 7.
(*i*) Prid. 78.
(*k*) *Burton* v. *Wileday*, Andrews, 32; *R.* v. *Chapelwardens of Haworth*, 12 East, 556; *Stead* v. *Heaton*, 4 T. R. 669. See also *R.* v. *Marsh*, 5 Ad. & E. 468; 6 N. P. 668, S. C.
(*l*) *R.* v. *Dalby*, 3 Q. B. 602.
(*m*) *Smith and Moze* v. *Keats*, 4 Hagg. C. R. 275.

The rectory, or vicarage, which is derived out of it, is not chargeable to the repairs to the body of the church, steeple, public chapel, or ornaments, being at the whole charge of repairing the chancel (*a*).

But where a local Act (*b*) for taking down and rebuilding a parish church, directed the rates to be made "*on the full annual rent or value of the houses, warehouses, shops, buildings, lands, tenements, and hereditaments rated or ratable to the relief of the poor of the said parish, on all and every the tenants and occupiers of the said parish,*" the *Queen's Bench* held that the tithes of the parish were ratable, as it would be repealing the statute to say that the words did not include tithes (*c*).

And where money had been borrowed of the Public Loan Commissioners under 5 Geo. 4, c. 36, for the repair of the church and chancel, it was held by the *Judicial Committee of the Privy Council* (overruling the decision of the *Court of Arches*) (*d*) that, in a rate made under that statute for the repayment of a portion of the money, the tithe rentcharge was liable to be rated (*e*).

And although where there are both rector and vicar, one of them only may repair the chancel, and the other be exempt; yet in that either of them doth it, both are dis-

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(*a*) Degge's P. C. p. 1, c. 12; Prid. 80. It appears from the report of the case of *The Bishop of Ely* v. *Gibbons and Goody*, 4 Hagg. Ecc. 156, that in the parish of *Clare*, in the county of *Suffolk*, in which parish the parishioners by custom repair the chancel, it was usual to assess the lessees of the impropriator's tithes to the church rate, and it is believed from information derived from the churchwardens of the parish that the vicar was also assessed in respect of his vicarial tithes. There has not been any church rate in the parish for some years.

(*b*) 1 Will. 4 c. lvii. (local and public).

(*c*) *R.* v. *Barker and others*, 6 A. & E. 388.

(*d*) *Edney and Lunn* v. *Smallbones*, 21 L. T. (N. S.) 506.

(*e*) See *Smallbones* v. *Edney and Lunn*, 3. P. C. 444. L. R.

charged all rates to the church, because the repair of the chancel equally lies upon the whole tithes and glebes that are parted between them, and that one of them doth it and the other is discharged, is wholly by composition between themselves (*f*).

But an impropriator of a rectory or parsonage, though bound to repair the chancel, is also bound to contribute to the reparation of the church, in case he hath lands in the parish which are not part of the rectory. This was judged by the whole Court in *Serjeant Davey's case*, without any question made of it (*g*).

So also must the parson and vicar contribute, if he has any other estate in the parish (*h*).

And if the glebes be out of the parish (as sometimes they are), their being glebes in this case cannot exempt them from being charged to the repair of the church in that parish where they lie. For in that parish no repairs of the chancel lie upon them, and therefore they are on the same footing as to this matter with the other lands of the parish, and consequently, must be charged equally with them to all the burdens of it. For no glebes are to be excused church repairs but such as belong to the church that is to be repaired, not those which belong to another church out of the parish in which the said glebes lie (*i*).

In the recent case of the *Tamworth* church rate (*k*) it was held that prebendal lands which were liable to the repair of the chancel were not assessable to the church rate.

It is said also that the patron of a church, as in right of the founder, may prescribe that, as in the right of the

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(*f*) Prid. 80, 81.
(*g*) Degge, P. C. p. 1. c. 80; Gibs. 197.
(*h*) Prid. 80.
(*i*) *Id.* 81.
(*k*) *Hill and Bailey* v. *Haskew*, Arches, 11 L. T. (N. S.) 253.

foundation, he and his tenants have been freed from the charge of repairing the church (*a*); but in *Smith and Moze* v. *Keats* (*b*) Dr. *Lushington* observed that he knew of no instance of the kind.

The inhabitants of a precinct having a chapel of ease, which they repair, are nevertheless of common right (*c*) contributors to the repairs of the mother church. If they have seats in the mother church, to go thither when they please, or receive sacraments, or marry or christen, or bury at it, there can be no pretence for a discharge, and what they have done in building them a chapel, and constantly repairing thither instead or going to the mother church, is only for their own ease, and that must not be made a disease to the rest of the parish, in casting the burden of the repair of the mother church wholly upon them, and that especially, since they are still, notwithstanding their chapel, members of the mother church, and have all rights in it equally with the rest of the parish (*d*).

It has, however, been said that certain portions of a parish may be exempt, by reason of *immemorial usage*, and the maintenance of a parochial chapel; though, to establish such an exception, it seems that something more would be required (*e*), as that in consideration thereof they have paid so much to the repair of the church, or the wall of the churchyard, or the keeping of a bell, or the like compositions, which are clearly a discharge (*f*); or else that

(*a*) See 1 Burn's Eccl. Law, 383; Degge, 158.
(*b*) 4 Hagg. C. R. 275.
(*c*) But see the sixth section of "The Compulsory Church Rate Abolition Act, 1868," *ante*, pp. 89, 94.
(*d*) Prid. 82.
(*e*) Degge, 208; Prid. 58, 59; *Smith and Moze* v. *Keats*, 4 Hagg. C. R. 275.
(*f*) Gibs. 197; and see *R.* v. *North Riding of Yorkshire JJ.*, 6 A. & E. 863.

the said chapel shall have immemorially had all parochial rights and sacraments, as divine services, baptism, marriage and burial, from which the law will presume that the chapel is coeval with, and independent of the parish church, and not a chapel of ease built in aid of the church (*g*).

It is quite clear that the existence of a private chapel and chaplains, whether attached to any public institution or not, cannot furnish the party to whom such chapel may belong, or who may be entitled to the use of it, with any claim for exemption from contributing to the rates for the repair of the parish church, nor, as it seems, can the fact that no rate has ever been made until recently upon the property in respect of which the exemption is claimed, unless it can be supported by some valid reasons, as the site being on former church lands, or on lands belonging to the founder, or exempted in some mode recognized by books of authority (*h*).

Another ground of objection supposed to exist, though it has not been specially treated of in the books, is where property is held of the Crown *jure coronæ*.

There can be no doubt that property in the occupation of the Crown, directly or indirectly, is exempt from church rates; but it is clear that the moment the property passes from the Crown to other hands, the privilege of exemption is lost, and therefore the governor of Greenwich Hospital, (which was founded in 1694, and was formerly part of an ancient royal demesne, but had been transferred from the

(*g*) See Tyrwhitt's Prid. 83, and the cases there collected. And also *Craven* v. *Saunderson*, 7 A. & E. 880. That the inhabitants of a parochial chapelry, which repairs its own church, might nevertheless, before "The Compulsory Church Rate Abolition Act, 1868," have been liable to contribute to the repairs of the mother church, see also *Piggott* v. *Bearblock*, 3 N. E. C. 85.

(*h*) Dr. *Lushington* in *Smith and Moze* v. *Keats*, 4 Hagg. C. R. 275.

Crown into the hands of commissioners for the purpose of a public charity), is liable to be assessed to church rates for premises in his *beneficial* occupation as governor (*a*).

This exemption extends to all cases where property is occupied for the purposes of the government of the country, including, under that head, the police and the administration of justice. It applies not only to property occupied for such purposes by the servants of the great departments of state, as the Post Office (*b*), the Horse Guards (*c*), or the Admiralty (*d*)—in all which cases the occupiers might strictly be called the servants of the Crown—but also to property occupied by local police (*e*), to county buildings occupied for the assizes and for judges' lodgings (*f*), or as a county court (*g*), or for a gaol (*h*); for these purposes are all public purposes of that kind, which by the constitution of this country fall within the province of Government, and are committed to the Sovereign, so that the occupiers, though not, perhaps, strictly servants of the Sovereign, might be considered in *consimili casu*.

But it has recently been held by the House of Lords, after a careful review of all the previous cases, that the

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(*a*) *Smith and Moze* v. *Keats*, 4 Hagg. C. R. 275; and see *Lord Bute* v. *Grindall*, 1 T. R. 338, affirmed in error, nom. *The Earl of Bute* v. *Grindall*, 2 H. B. 265; *R.* v. *Lady Emily Ponsonby*, 3 Q. B. 14; *R.* v. *Sir M. A. Shee and others*, 4 Q. B. 2; *R. pros. Overseers of St. Michael's Cambridge* v. *Henry Smith*, 30 L. J. M. C. 74

(*b*) *Smith* v. *Birmingham*, 7 E. & B. 483.

(*c*) *Lord Amherst* v. *Lord Summers*, 2 T. R. 372.

(*d*) *R.* v. *Stewart*, 8 E. & B. 360.

(*e*) *Lancashire JJ.*, v. *Shelford*, E. & E. 230.

(*f*) *Hodgson* v. *The Local Board of Health of Carlisle*, 8 E. & B. 116.

(*g*) *R.* v. *The Township of Manchester*, 8 E. & B. 336; 23 L. J. (N. S.) M. C. 48.

(*h*) *R.* v. *Shepherd*, 1 Q. B. 70. See further as to what are Government purposes *R.* v. *The Inhabitants of St. Martin's, Leicester; R.* v. *The Inhabitants of Castle View, Leicester*, 2 Q. B. 493, L. R.; 36 L. J. (M. C.) 99.

exemption from liability to poor rate is limited to the Sovereign and to the servants of the Crown; and that it does not extend to the case of property occupied by bare trustees for public purposes, not being Government purposes within the meaning of that term as above explained (*i*).

It follows as a consequence from this decision, that trustees who are in law the tenants and occupiers of valuable property upon trust for charitable purposes, such as hospitals or lunatic asylums, are in principle ratable to the poor rate, notwithstanding that the buildings are actually occupied exclusively by the objects of the charities and for the necessary purposes of such charities (*k*).

Before this decision the law upon the subject was very unsettled, and the cases were very conflicting, several of them being based, apparently, upon the assumption that bare trustees in the occupation of valuable property for public or charitable purposes, were not liable to the rate; but these cases, so far as they are really based upon that principle, must now be considered as overruled.

It will be observed that the effect of this decision is to render the trustees of charitable institutions ratable, where they can be deemed the occupiers. It is apprehended that it does not affect the question of the non-ratability of the mere inmates of charitable institutions, who would still be

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(*i*) See *Jones and others* v. *The Mersey Docks and Harbour Board; The Mersey Docks and Harbour Board* v. *Cameron and others*, 35 L. J. (N. S.) M. C. 1.

(*k*) So decided by the *House of Lords* on the authority of this case and of *Greig* v. *The University of Edinburgh*, L. R. 1 Scotch Ap. and Div. 348, in the recent case of *The Mayor, &c., of London, Governors of St. Thomas's Hospital*, plaintiffs in error, v. *Stratton and others*, defendants in error, March 1st, 1875, M. S., and by the Court of Queen's Bench in the recent case of *R.* v. *Overseers of Derby*, Law Rep. Week. Notes for 1875, p. 93, in which it was held that a certified industrial school under "The Industrial Schools Act, 1866" (29 & 30 Vict. c. 118), is ratable to the relief of the poor.

held not to be liable, unless it could be shown that they fulfilled the character of legal occupiers, enjoying a beneficial occupation as tenants. In *Smith and Moze* v. *Keats* (*a*), Dr. *Lushington* said that it could not be maintained that the inhabitants of Greenwich Hospital, consisting of disabled seamen, the objects of the charity, inmates only, because they are otherwise incapable of maintaining themselves, should be rated to a church rate; to rate them would be almost as absurd as to assess paupers in poor-houses and maniacs in St. Luke's (*b*): and it is presumed that this would still be held to be law.

But although the object of the charity, or the mere servants of the establishment, may not be ratable, there can be no doubt that where there is a beneficial occupation by the officers of the establishment of separate and distinct apartments for the use of themselves and their families, such officers are themselves ratable as the inhabitants and occupiers of such separate and distinct apartments, which are considered as their dwelling-houses (*c*); for the law will infer from such beneficial occupation an ability to contribute to the rate. And even the objects of a charitable foundation in the actual occupation of an almshouse have been held to be ratable to the poor rate, if they derive a benefit from their occupancy; as where *Lord Rich* granted a house and farm for the support of five old persons (*d*); and where the *Merchant Taylors Company* erected a house

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(*a*) Hagg. C. R. 275.

(*b*) See *R.* v. *Occupiers of St. Luke's*, 2 Bur. 1093; *R.* v. *St. Bartholomew-the-Less*, 4 Bur. 2439.

(*c*) See *R.* v. *Occupiers of St. Luke's*, 2 Bur. 1093; *R.* v. *St. Bartholomew-the-Less*, 4 Bur. 2439. See also the dictum of Lord *Alvanley* in *Halford* v. *Copeland*, 3 Bos. & Pul. 139; and see *Tracey* v. *Taylor*, 3 Q. B. 966; *Neave* v. *Weather*, 3 Q. B. 984.

(*d*) *R.* v. *Munday*, 1 East, 584.

for the reception of the widows of poor freemen of their company (*e*); and perhaps, in strictness, they are also liable to be rated to the church rate, for where the occupation is so far beneficial as to raise a presumption in law of an ability to contribute to the poor rate, the same presumption naturally arises with reference to the church rate.

So also the hall of a company is liable to be rated to the repairs of the church, and the corporation is to be considered as the occupiers for this purpose. And the *Spiritual Court* may proceed against the master and wardens of the company in case of non-payment (*f*).

But if a petty chapman take a standing for rent to be paid by him in the waste of the manor within the market for two or three hours every market day, to sell his commodities, the market being holden there one day every week, but he inhabiteth in another parish,—he may not be rated to the reparation of the church for this standing (*g*). Nor can a pew-owner be rated in respect of a pew (*h*).

Nor can a person be assessed to the church rate in respect of a mere incorporal hereditament, as a right of common or a right of way; but if his right to turn out the cattle is connected with the possession of the land, or he has the exclusive occupation of the way, as for example, of a towing-path, he will be ratable (*i*).

(*e*) *R.* v. *Green*, 9 B. & C. 203.

(*f*) *Thursfield* v. *Jones*, Jones, 187; 1 Burn's Eccl. Law, 384. But of course this could only be done now in those exceptional cases in which the payment of church rates may still be enforced; see "The Compulsory Church Rate Abolition Act, 1868" (31 & 32 Vict., c. 109), sects. 1, 2, 3, 4, 5.

(*g*) *Hollyness* v. *The Churchwardens of Kettering in Northamptonshire*, 2 Roll. Abr. 289. See also 1 Burn's Eccl. Law, 184.

(*h*) *Hawkins* v. *Compeigne*, 3 Phill. 11.

(*i*) *Medland and Brown* v. *Paine*, 4 Jur. (N. S.) 1233; 7 Week, Rep. 357.

In like manner, the right to take game, which is a mere easement, is not of itself ratable, and where the right to take the game is in one tenant, and the possession of the land in another, no person is ratable in respect of the right to take the game (*a*). But where the owner of the land is himself the occupier, and himself enjoys the right to take the game, or lets it at a profit to another, he is assessable in respect of his occupation as enhanced in value by the right to take the game (*b*).

It should be added that, although it is now well settled, that a beneficial occupier, whether he occupy for his own benefit or as a bare trustee, is liable to the poor rate (*c*) ; yet, to render him liable, he must have a beneficial occupation ; —if he occupy land which yields him no return whatever, he will not be liable ; and, therefore, the corporation of a municipal borough have recently been held not to be liable in respect of commonable lands in their occupation, the whole proceeds of which were exhausted by the freemen of the borough in the exercise of their rights of common (*d*).

(*a*) *R.* v. *Thurston*, 1 E. & E. 502; *R. pros. Meyrick*, app., v. *The Guardians of the Poor of Battle Union*, resps., 2 Q. B. 8. L. R.—S C, nom. *The Queen* v. *The Guardians of the Union of Battle, Sussex, and others*, 36 L. J. M. C. 1. This question is not affected by "The Rating Act, 1874" (37 & 38 Vict., c 54), by which sporting rights, when severed from the occupation of the land, are made ratable to the *poor* rate. It is apprehended that the lands used for plantations, &c., and the mines which have been made ratable to the *poor* rate by that Act, are assessable to the *church* rate by the common law.

(*b*) *The Overseers of the Township of Hilton and Walkerfield*, apps., v. *The Overseers of Bowes*, resps., 35 L. J. M. C. 137.

(*c*) *Jones and others* v. *The Mersey Docks and Harbour Board ; The Mersey Docks and Harbour Board* v. *Cameron and others*, 35 L. J., M. C. 1.

(*d*) *The Mayor, &c., of Lincoln*, apps., *The Overseers of Holmes Common*, resps., 2 Q. B. 428, L. R ;—S. C. 36 L. J. M. C. 73.

But although the general law requires that the party assessed should be a *beneficial* occupier, the question of the beneficial character of the occupation has been held to be immaterial, where an Act of parliament directs the rate to be made *upon all persons, inhabitants and occupiers of land*, &c., within the parish, for in such case all occupiers, whether the occupation be beneficial or not, come directly within the words and meaning of the Act (*e*).

It should be borne in mind that the decisions upon the poor rate depend upon the construction of an Act of parliament, but the same principles would seem to be applicable in cases of church rate (*f*).

By 3 & 4 Will. 4, c. 30 it is enacted, "that from and after the 1st day of October, 1833, no person or persons shall be rated, or shall be liable to be rated, or to pay any church or poor rates, or cesses for or in respect of any churches, district churches, chapels, meeting-houses, premises, or such part thereof as shall be exclusively appropriated to public religious worship, and which (other than churches, district churches, and episcopal chapels of the Established Church) shall be duly certified for the performance of such religious worship according to the provisions of any Act or Acts now in force : provided always, that no person or persons should be exempted from any such rates or cesses for or in respect of any parts of such churches,

(*e*) *R.* v. *Wilson*, 12 A. & E. 94, See further as to what constitutes a beneficial occupation *The Metropolitan Board of Works* v. *The Overseers of West Ham*, 6 Q. B. 193, L. R., and as to what constitutes an occupation of land, see *Cory and others*, apps., *The Churchwardens of Greenwich*, resps., 7 C. P. 499. L. R.; *R.* v. *The Abney Park Cemetery Company*, 8 Q. B. 515, L. R.; *The Pimlico Tramway Company* v. *The Overseers of Greenwich*, 9 Q. B. 9, L. R.; *Allan* v. *Liverpool, and Inman* v. *Kirkdale*, ib. 180, and *Kittow* v. *The Guardians of the Liskeard Union*, 10 Q. B. 7, L. R.

(*f*) See the observations of Dr. *Lushington* in *Smith and Moze* v. *Keats*, 4 Hagg. C. R. 275.

district churches, chapels, meeting-houses or other premises, which are not so exclusively appropriated, and from which parts not so exclusively appropriated such person or persons shall receive any rent or rents, or shall derive profit or advantage."

By section 2 it is provided, "that no person or persons shall be liable to any such rates or cesses, because the said churches, district churches, chapels, meeting-houses or other premises, or any vestry-rooms belonging thereto, or any part thereof, may be used for Sunday or infant schools, or for the charitable education of the poor."

And by 6 & 7 Vict. c. 36, s. 1, it is provided, that from and after the 1st day of October, 1843, no person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay to any county, borough, parochial, or other local rates or cesses, in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes; provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members; and provided also that such society shall obtain the certificate of the barrister-at-law as thereinafter mentioned.

Section 2 provides, that before any society shall be entitled to the benefit of the Act, they shall cause three copies of their rules of management to be submitted to the barrister appointed to certify the rules of friendly societies (*a*), who is to certify on each of the copies that the society is entitled

(*a*) *i.e.*, by the registrar, who is to be a barrister of not less than seven years' standing. Sec. 18 & 19 Vict. c. 63, ss. 6, 33.

to the benefit of the Act, or state in writing the grounds on which such certificate is withheld, and one of such copies, when certified, is to be returned to the society, another to be retained by the barrister, and the other to be transmitted by him to the clerk of the peace of the borough or county where the premises in question are situated, to be filed by such clerk of the peace with the rolls of the sessions.

Section 3 provides, that if the laws, rules, and regulations of the society shall be altered so as to affect the property or constitution of the society, such alteration shall, within one calendar month, be submitted to such barrister, who is to certify as aforesaid, and the rules so certified are in like manner to be filed with the clerk of the peace ; the society in the meantime being entitled to the benefit of the Act, but subject to such appeal as is thereinafter mentioned, ceasing to be entitled if the barrister shall refuse to certify.

By the 5th section, it is provided, that if the barrister shall refuse to certify, the society may then submit their rules to the court of quarter sessions, where the premises are situated, together with the reasons assigned by the barrister as aforesaid, and that the recorder or justices may if he or they think fit, order the same to be filed notwithstanding such refusal, and that such filing shall have the same effect as if the barrister had certified.

And finally, it is provided by the 6th section, that any person assessed to any rate from which any society shall be exempted by this Act, may appeal from the decision of the barrister in granting the certificate, within four calendar months next after the first assessment of such rate made after such certificate shall have been filed, or within four calendar months next after the first assessment of such rate made after such exemption shall have been claimed, giving to the clerk or secretary of the society twenty-one

days' notice of appeal in writing, together with a statement in writing of the grounds of appeal, and within four days after such notice entering into recognizances with two sureties to try and abide the order of sessions, and pay such costs as shall be awarded, and that the recorder or justices shall hear such appeal on such grounds only, and if it appear to him or them that the certificate was granted contrary to the provisions of the Act, shall annul the same, and that his or their determination concerning the premises shall be conclusive and binding on all parties to all intents and purposes whatsoever.

But if a society originally instituted exclusively for the purposes of science and the fine arts, and so certified pursuant to the statute, lets out portions of its premises for public political meetings, and private exhibitions, and for the admission to which money is taken at the doors, it forfeits its exemption from contribution to local and parochial taxation under this statute, even though the proceeds of such letting are devoted to the purposes of the society, and no dividend is declared out of the rent paid on such occasions (*a*).

Again it is provided by the first section of the "Sunday

(*a*) *Purvis and others* v. *Trail*, 3 Exch. 344. See further upon the construction of this statute, *R.* v. *Pocock*, 8 Q. B. 729; *R.* v. *Jones*, 8 Q. B. 719; *R.* v. *Phillips and another*, 8 Q. B. 743; *Churchwardens of Birmingham* v. *Shaw*, 10 Q. B. 868; *R.* v. *Brandt*, 16 Q. B. 462; *R.* v. *Overseers of Manchester*, 16 Q. B. 449; *Earl of Clarendon* v. *St. James's, Westminster*, 10 C. B. 806; *R.* v. *Gaskill*, 16 Q. B. 472; *R.* v. *Cockburn*, 16 Q. B. 480; *Governors of Russell Institution*, apps., *St. Giles-in-the-Fields and St. George's, Bloomsbury*, resps., 3 E. & B. 416. *The Linnœan Society of London* v. *St. Anne's Westminster*, 3 E. & B. 793; *Marylebone Vestry* v. *The Zoological Society*, ib. 807; *Purchas* v. *The Churchwardens of the Holy Sepulchre*, 4 E. & B. 157; *Scott*, app., v. *Churchwardens of St. Martin-in-the-Fields*, resps., 5 E. & B. 558; *The Bradford Library Society* v. *The Churchwardens of Bradford*, 1 E. & E. 88; *The Liverpool Library* v. *The Mayor of Liverpool*, 5 H. & N. 526. For further information as to the ratability of property, and who are

and Ragged Schools (Exemption from Rating) Act 1869," 32 & 33 Vict., c. 40, that from and after the thirtieth day of September, 1869, every authority having power to impose or levy any rate upon the occupier of any building, or part of a building, used exclusively as a Sunday school, or ragged school, *may* exempt such building or part of a building from any rate for any purpose whatever, which such authority has power to impose or levy.

Section 2 defines the term "Sunday school" to mean any school used for giving religious education gratuitously to children and young persons on Sunday, or week days, for the holding of classes and meetings in furtherance of the same object, and without pecuniary profit being derived therefrom; and in like manner section 3 provides that the term "ragged school" shall mean any school used for the gratuitous education of children and young persons of the poorer classes, and for the holding of classes and meetings in furtherance of the same object, and without any pecuniary benefit being derived therefrom except to the teacher or teachers employed.

It will be observed that this statute, which applies to rates of every kind, does not render it obligatory to exempt from the rate, the words of section 1 being not "*shall* exempt," but "*may* exempt" (*b*), whilst the statute of William IV. above referred to (*c*) which extends only to poor rates and church rates, confers a *right* of exemption in respect of the buildings and parts of buildings used for Sunday or infant schools, or for the charitable education of the poor, which are within the protection of that Act. This right of exemption is expressly preserved by a proviso

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to be considered occupiers, the reader is referred to the valuable treatises published on the poor laws, and especially to *Burn's Justice*, tit. "Poor," and *Archbold's Justice of the Peace*, vol. iii.

(*b*) See *Bell* v. *Crane*, 8 Q. B. 481, L. R.

(*c*) 3 & 4 Wm. 4, 3. 30.

at the end of the first section of the Sunday and Ragged Schools Act.

In strictness, a regular valuation should then be made of all the ratable property in the parish, in order that an equal assessment may be laid ; and the vestry may, if they please, appoint a committee for this purpose ; but *primâ facie* the poor rate furnishes a fair ground of analogy, and it is generally prevalent in parishes that the church rate shall be made according to the poor rate ; and that it should be made upon this principle seems, in ordinary cases, natural, just, and prudent ; for the poor rates are a great, heavy, and constant charge ; the parishioners are deeply interested in the fairness of the assessment ; there is every probability of its being just and equal ; much expense and inconvenience may be saved by adopting it (*a*) and where the same valuation has for any length of time been acquiesced in by the parish, especially if it have been taken as the basis of both church rate and poor rate, the presumption is strongly in favour of the assessment (*b*).

It must, however, be borne in mind that the poor rate is only *primâ facie* evidence of the fairness of the assessment, more or less strong according to the circumstances of the case, and if it can be clearly and affirmatively proved by the party objecting to the rate, that the assessment is in fact unequal, it will furnish no answer to the objection to show that the rate has been made according to the poor rate (*c*), even in a case where the requisite church rate is

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(*a*) See *Miller* v. *Bloomfield*, 1 Add. 499 ; *Thomson and Sandford* v. *Cooper*, 3 Phil. 640 (n) ; *Lambert and Simpson* v. *Weall*, 4 Hagg. C. R. 91. This plan is also approved and recommended in the Eccl. Law Rep. p. 48.

(*b*) *Lambert and Simpson* v. *Weall*, 4 Hagg. C. R. 91.

(*c*) See *Medland and Brown* v. *Paine*, 4 Jur. (N. S.) 357 ; 7 Week. Rep. 357.

small, and great expense would have been incurred by the making of a fresh assessment (*d*).

In making the assessment to the church rate according to the poor rate, it must be further remembered that it is provided by many local Acts of parliament, that the poor rate of property under a given rental shall be paid by the landlords instead of the tenants. The parties assessed to the poor rates in these cases are, of course, the landlords; but where these Acts have no reference to the church rate, as is generally, if not always the case, the common law, which requires the *occupiers* to be assessed, must still prevail, and it will be illegal in the churchwardens to assess the landlords (*e*).

It may not be amiss to observe, that by a statute passed in the early part of the reign of the present Queen (*f*) stock-in-trade was exempted from liability to the poor rate until the 31st day of December, 1841; and by several subsequent Acts (*g*) this exemption has been from time to time extended till the 1st day of October, 1874 (*h*), and end of the then

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(*d*) *Hill and Bailey* v. *Haskew*, 11 L. T. (N. S.) 253, and see *Edwards and Mann* v. *Hutton*, 35 L. J. Ec. 1, 1 L. R., Ec. 21, and *Barnes* v. *Grant*, 35 L. J. Ec. 9, 1 L. R. Ec. 37, in which cases church rates were upheld although the assessments varied materially from the valuation lists made under "The Union Assessment Committee Act, 1862" (25 & 26 Vict. c. 103).

(*e*) *Chesterton and Hutchins* v. *Farlar*, 1 Curt. 345; *White and Jackson* v. *Beard*, 2 Curt 480. See the observations of Dr. *Lushington* in the latter case. See also *Hawes and Vicatt* v. *Pellatt*, 2 Curt. 473; but see *Thompson and Sandford* v. *Cooper*, 3 Phill. 640, and the observations of Sir *Herbert Jenner Fust*, in *Nunn* v. *Varty and Mopsey*, 3 Curt. 352, and *vide post*, c. 3, s. 2, on the objection to a rate that the party has been overrated. That the law was the same with respect to the Small Tenements Act, 13 & 14 Vict. c. 99, see *ante*, p. 174.

(*f*) 3 & 4 Vict. c. 89.

(*g*) The statute now in force is "The Expiring Laws Continuance Act, 1870" (37 and 38 Vict. c. 76).

(*h*) And no doubt it will during the present session (38 & 39 Vict.) be further extended until the 1st day of October, 1875, and end of the then next session of parliament.

session of Parliament; but as these Acts are silent on the subject of the church rate, they do not affect the liability of stock-in-trade to be rated for that purpose in parishes where it has been usual to assess it (*a*).

An ordinary plan, with regard both to the poor rate and the church rate, used to be to put a moderate value upon the property, and assess at two-thirds of that value (*b*); and it is apprehended that this method may still be legally adopted for the church rates, although by 6 & 7 Will. 4, c. 96, and 25 and 26 Vict. c. 103, the *poor* rate must now be assessed on the *actual* value.

The amount at which any specific property should be rated is to be regulated by its fair annual value, and not according to the rent only; for supposing it should be a custom in the parish for landlords to receive very small annual rents, and take large fines, there would be little or nothing to be assessed, and so the church would go to ruin (*c*).

Thus the lessees of a market are to be assessed according to the real produce of the tolls, and not according to the rent only (*d*).

So, the value at which a house is to be assessed is that for which it would let; not at what a proprietor who, from family feelings, would choose to submit to inconvenience rather than abandon the old mansion, would value it (*e*).

In all these rates it will be fairest for the churchwardens not to assess themselves, but to leave this to be done by the

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(*a*) *Miller* v. *Bloomfield*, 1 Add. 409.
(*b*) See *Lambert and Simpson* v. *Weall*, 4 Hagg. C. R. 91.
(*c*) Per Sir *Geo. Lee*, in *Sewell and another* v. *Twyford and Mann*, 2 Lee, 150.
(*d*) *Sewell and another* v. *Twyford and Mann*, 2 Lee, 150.
(*e*) Per Cur. in *Lambert and Simpson* v. *Weall*, 2 Hagg. 91.

parishioners who concur with them in making the said rate ; but if there be a stated valuation of all the lands and houses in the parish justly and fairly made, and all be equally laid according thereto by a pound rate, there can be no error or injustice in this manner (*f*).

The form of the church rate may be this (*g*):—

"We, the churchwardens and other parishioners of the parish of ————, in the county of ————, and diocese of ————, whose names are hereunto subscribed, do hereby this ———— day of ————, in the year 18————, at our vestry meeting for that purpose assembled, rate and tax all and every the inhabitants and parishioners of the parish aforesaid, hereunder mentioned, for and towards the repairs of the church of the said parish for the present year, the several sums following, that is to say :— .

	£	*s.*	*d.*
A. B.	1	2	0
C. D.	0	3	0
E. F.	3	9	0

And so on.

A. B. } Churchwardens.
C. D. }

E. F. }
G. H. } Parishioners.
I. K. }

It should be remarked here that the rate must, by its heading or otherwise, show upon its face for what purpose and by what authority it was made, or it will be void (*h*).

(*f*) Prid. 79.

(*g*) See Tyr. Prid. 79, 80. But as to the necessity of giving some description of the property rated, *vide post*, p. 194.

(*h*) Re *The Eastern Counties Railway Company and Overseers of Moulton*, 25 L. J. M. C. 49.

And if the purpose shown be such as by reasonable intendment might be held to include matters foreign to church rate, as if the heading were "for and towards the repairs of the church, *and other incidental charges of the parish*," without adding "*legally chargeable to church rates*," or the like, this, as it seems, would vitiate the rate (*a*).

On this principle the Court of *Queen's Bench*, in the case of *R.* v. *Crook* (*b*), apparently inclined to the opinion that a rate made by the churchwardens out of vestry, in alleged pursuance of a resolution of vestry for the making of a rate for *the necessary repairs of the church*, which purported by its heading to have been made "for the necessary repairs of the church, *and other necessary expenses relating to the improvements of the church*," could not be sustained; for although it might be said that the word "improvements" meant "repairs," it might also be said to include the erection of new galleries,—a matter not authorized by the resolution of the vestry.

The form above given is taken from Mr. *Tyrwhitt's* edition of Dr. *Prideaux's* "Directions to Churchwardens" (*c*); but even where the church rate is made on the same assessment or rental as the poor rate, it is certainly advisable, if not absolutely necessary, to add, opposite the name of each parishioner, a general statement of the nature and situation, or name, or other sufficient description of the property rated (*d*).

(*a*) *R.* v. *Byrom and another*, 12 Q. B. 321.

(*b*) *Vide supra*, p. 69, and note (*e*).

(*c*) See Dr. *Prideaux's* "Directions to Churchwardens," with notes, by R. P. Tyrwhitt, Esq., tenth edition, pp. 79, 80.

(*d*) Perhaps the best plan in ordinary cases is to follow the form prescribed for poor rates by the Parochial Assessment Act, 6 & 7 Will. 4, c. 96, or "The Union Assessment Committee Act, 1862," 25 & 26 Vict. c. 103.

The rate having been granted by the vestry, and the assessment duly made, the churchwardens should apply to the ordinary for a *faculty* confirming the rate (*e*).

Any person who thinks himself aggrieved may then enter a *caveat* against the confirmation, and the ordinary will either confirm the rate or quash it, according to the merits of the case (*f*); but although it is usual and proper to apply for a confirmation of the rate, and the *Ecclesiastical Courts* have censured any omission to do so (*g*), such confirmation is not essential to the validity of the rate, and the circumstance of its not being so confirmed is no obstacle to its being sued upon in the *Ecclesiastical Courts* (*h*); nor, on the other hand, does the fact of its having been confirmed preclude a party from resisting payment of the rate, and availing himself for that purpose, of any illegal objection to its validity (*i*); but he will not be allowed to take original proceedings in the *Ecclesiastical Court* for the purpose of setting aside the rate altogether. The only method of quashing the rate is by entering a *caveat* against its confirmation. The party then appears in the nature of a defendant (*k*).

The very words in which the ordinary confirms the rate show some doubt how far he has authority to interpose in

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(*e*) Prid. 71.

(*f*) That the *Ecclesiastical Court* has no power to amend the rate, see *White and Jackson* v. *Beard*, 2 Curt. 480.

(*g*) See *Lee and Parker* v. *Calcraft*, 3 Phill. 604.

(*h*) *Knight and Littlejohns* v. *Gloyne*, 3 Add. 53.

(*i*) *White and Jackson* v. *Beard*, 2 Curt. 480; *Scale* v. *Veley and Joslin*, 1 N. E. C. 170; *Veley and Joslin* v. *Gosling*, 1 N. E. C. 457.

(*k*) *Watney* v. *Lambert and Simpson*, 4 Hagg. C. R. 84; and see *Ramsbottom* v. *Duckworth and Lilburn*, 1 Exch. 506, and the judgment of Lord *Campbell*, C. J., in *R.* v. *Collins and another, Durham JJ.*, 21 L. J. M. C. 73; and of the Court, in *Tozer* v. *Child and another*, 25 L. J. Q. B. 337.

respect to the amount taxed as the assessment—"we confirm as far as by law we may" (*a*).

SECTION V.

On the additional Steps to be taken when anything New is to be added to the Church.

When the object of the rate is simply to *repair* or *restore*, nothing further need be done to authorize the making of the rate; but if any new additions are to be made in the church, the license of the ordinary is also necessary before they can be legally and justifiably added, or new erected there; for the ordinary having the ordering and disposing of all things in the church, nothing must be new erected there without his license under any pretence of order or decency whatsoever, because neither the parishioners nor the churchwardens are the legal judges of what is best for order and decency in this case, but the ordinary only (*b*).

And, therefore, though the major part of the parish be consenting to the new addition, and thereby the churchwardens may be empowered, as far as in the parishioners lieth, to make and levy a rate for reimbursing themselves of the charges, yet if any one person in the parish dissents from it, and refuseth payment, they can have no remedy against him, because the thing being illegally done, without that authority which the law requires to warrant it, no rate will be judged legal which shall be made for it (*c*).

And, therefore, if the churchwardens would set up a new

(*a*) *Watney* v. *Lambert and Simpson*, 4 Hagg. C. R. 84.
(*b*) Prid. 48. And see *Hopton and Quarrell* v. *The Minister and Parishioners of Kemerton*, 6 N. E. C. 74.
(*c*) Prid. 48, 49.

seat where there was none before, make a new gallery, erect an organ, or add anything else to the church, they cannot legally do it, unless they have first the consent of the major part of the parish, and next the license of the ordinary, to justify them in it (*d*).

The consent of the parish is made necessary to secure their estates from unjust taxations ; and the license of the bishop is required to secure the church from having any nuisance or unfitting incumbrance erected in it, whereby the decent performance of the divine offices may be impeded, or the people in any way hindered from fully partaking of the benefits of them (*e*).

But if the thing that is added be not in the church, nor is added to the fabric or its appurtenances for any religious use, but only for the benefit, convenience, or curiosity of the parishioners, as a clock, a dial, chimes, supernumerary bell (*e*), &c., in this case the license of the ordinary is not requisite, but it will be sufficient if the major part of the parish be consenting thereto (*e*).

But if the new erection be in the chancel, the leave of the parson is also necessary, because the chancel belongs to him, and is a part of his glebe ; and, therefore, if the churchwardens set up any new seat in the chancel, or place rails there at the altar, they must have not only the consent of the parish, but also the leave of the parson, as well as the license of the ordinary, before it can be legally done (*e*).

So, also, if any alteration or addition be contemplated in the churchyard, as the making of a new path therein, it cannot legally be done without the license of the ordinary,

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(*d*) Prid. 49, 50.
(*e*) *Ib.* 50.

who hath the general superintendence of such matters and is the sole judge of their fitness and propriety, and also the consent of the rector, which is necessary by reason of his common law right; and, therefore, it is no answer to proceedings against churchwardens in the *Ecclesiastical Court* for making a new path in the churchyard without the consent of the rector, that they acted *bonâ fide*, and for the benefit of the parishioners, and under the express sanction and direction of the vestry (*a*); though possibly, if a faculty were applied for, and the rector obstinately opposed it, the Court might be induced to grant it, as in *Tattersall* v. *Knight* (*b*), where a faculty was granted notwithstanding the opposition of the vicar; but that was for the erection of a gallery *inside* the church. But supposing the alterations were most convenient, still the Court would not sanction them, unless the consent of the rector had been previously given, or at least asked (*a*). And where the churchwardens, acting upon a resolution of vestry, but against the express prohibition of the rector, and without any lawful authority from the bishop, broke open the door of the church, and proceeded to alter the position of the pulpit, and to pull down and re-arrange certain of the seats within the church, they were held to have been guilty of a grave ecclesiastical offence, and were ordered to restore that which had been altered, and to pay the costs of the suit (*c*).

A *fortiorari*, where a parish church is to be pulled down and a new church built a faculty must be obtained; but where this is done, or the church is added to, or enlarged, under authority of the Church Building Acts, a faculty is

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(*a*) *Walter v. Montague and Lamprell*, 1 Curt. 253.
(*b*) 1 Phill. 232.
(*c*) *Dowdney* v. *Good and Ford*, 7 Jur. (N. S.) 637; and see *Adlam* v. *Colthurst*, 36 L. J. Ecc. 14.

not necessary: it will be sufficient if the consent required by this Act is obtained (*d*).

As to the power given to the church building commissioners of altering, repairing, pulling down, and rebuilding the walls and fences of churchyards and stopping up and varying the paths, &c., see 59 Geo. 3, c. 134, s. 39 (*e*).

But here it is to be observed, that the consent of the parish is not required as necessary to authorize the thing, but only to oblige them to pay for doing of it (*f*).

Whether it be fitting to be done or not belongs only to the ordinary to judge; but whether the parish will pay anything towards it being wholly in their own power, this is all the reason that makes their consent requisite to the thing (*g*).

And, therefore, if the parson with the leave of the ordinary, or any other person with the consent of the parson and the license of the ordinary, have a desire to set up rails at the altar at their own proper costs and charges, without concerning the parish to give anything towards it the parish is no way concerned either to give or deny their consent thereto (*h*).

So, if any person be desirous, at his own expense, of erecting an organ in the church, a faculty may be granted

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(*d*) *Warner* v. *Gater*, 2 Curt. 315. See *post*, s. 5.

(*e*) That so much of 55 Geo. 3, c. 68, as was incorporated into 59 Geo. 3, c. 134, is still in force, notwithstanding the repeal of the first-named statute by 5 & 6 Will. 4, c. 50, see *R.* v. *Stock*. 8 A. & E. 405; *R.* v. *Arkwright*, 12 Q. B. 960. That no appeal lies from the decision of the commissioners, see *R.* v. *Stock*, supra, and that the notice required by these Acts must be given before the order is made, see *R.* v. *Arkwright*, supra.

(*f*) Prid. 53.

(*g*) *Ib.* 53, 54.

(*h*) *Ib.* 54.

for that purpose; although the majority of the parishioners dissent from its erection (*a*).

When a faculty is prayed an intimation goes from the ordinary calling upon all persons interested "to show cause why it should not be granted" (*b*), and although he is not bound by the views of the majority of the parish, he will pay great attention to them (*c*), at the same time that he will not be inattentive to the opinions of the minority (*d*), and he will always regard the private rights of parties who may be interested by prescription or otherwise, and will always receive with respectful attention the arguments of the incumbent against the grant, either on the ground of injury to himself or of damage to the public (*e*).

In the recent case in the Consistory Court of London of *The Vicar and Churchwardens of Tottenham* v. *Venn and another* (*f*), the application for a faculty to authorize certain alterations in the parish church was opposed by a majority of the parishioners at large, but supported by a majority of the parishioners who were members of the Church of England. The Court, in granting the faculty with respect to such of the alterations as affected the comfort and convenience of those who attended the church, said, that although it might be fairly influenced by the vote of the vestry in relation to alterations likely to affect the archi-

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(*a*) *The Churchwardens of St. John's, Margate,* v. *The Parson, Vicar, and Inhabitants of the same Parish,* 1 Hagg. C. R. 198.

(*b*) See *Grove and Wright* v. *The Rector, &c., of Hornsey,* 1 Hagg. C. R. 189; *Rugg* v. *Kingsmill,* 5 Moore, P. C. (N. S.) 19; 2 Ad. & E. L. R. 59.

(*c*) *Grove and Wright* v. *The Rector, &c., of Hornsey,* 1 Hagg. C. R. 189.

(*d*) *The Churchwardens of St. John's, Margate,* v. *The Rector, Vicar, and Inhabitants of the same Parish,* supra.

(*e*) *Rugg* v. *Kingsmill,* 1 A. & E. L. R. 343.

(*f*) 4 Ad. & Ecc. 221 L. R.

tectural appearance of the church, or the convenience of the public, yet it was bound in matters connected with the comfort and convenience of those who attended the church to give greater weight to the opinion of the majority of those parishioners who were members of the Church of England (*g*).

And when a faculty is prayed for unnecessary and expensive alterations it will always be refused, unless the ordinary is satisfied that ample security has been given for providing the requisite funds, so as to protect the parish from all liability (*h*).

It may be mentioned here, that if the new erection or other addition to the church is not in its nature illegal, the ordinary may, in his discretion, grant a confirmative faculty after it has been made (*i*). And such confirmative faculty

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(*g*) The principal objection to one of the proposed alterations was, that it would necessitate the stopping up or diversion of certain ancient footpaths passing round the east end of the church,—and the Court directed that the faculty should not issue until an order had been obtained from the ecclesiastical commissioners and two justices of the peace under 59 Geo. 3, c. 134, s. 39, sanctioning the diversion of the footpaths. But, upon its being afterwards shown to the Court that the Ecclesiastical Commissioners had refused to put in force the powers conferred on them by that statute, the Court decreed that a faculty for the diversion of the footpaths should issue without an order sanctioning such diversion having been obtained from the Ecclesiastical Commissioners and two justices; but not until a further faculty authorizing the petitioners to make a new footpath had been granted.

(*h*) *Hopton and Quarrell Churchwardens of Kemerton*, v. *The Minister and Parishioners of Kemerton*. 6 N. E. C. 74. And see *Jackson* v. *Singer and Carson*, 37 L. J. Ecc. 9, where the Court decreed a faculty for the erection of a new pulpit in lieu of the existing pulpit, which was well suited and sufficient for its purpose; but instructed the registrar not to allow it to issue until a certificate was lodged in the registry that the balance of the debt incurred in the erection of the church had been paid off.

(*i*) *Sieveking and Evans* v. *Kingsford*, 36 L. J. Eccl. 1.

may be prayed in answer to an application for a faculty to remove without the issuing of a fresh citation (*a*).

It should be further stated, that in order to give the Ecclesiastical Court jurisdiction, the church must be consecrated. And if the church has never been consecrated, or requires re-consecration, the faculty cannot be granted, for the jurisdiction of the Court depends entirely *ratione loci*. In *Turner* v. *The Rector of Hanwell* (*b*), Dr. *Lushington*, in refusing a faculty for a burial place in a church which had been almost entirely taken down, and was in the course of rebuilding, is reported to have said, "if the altar has been taken down there must be a re-consecration, as my jurisdiction depends entirely *ratione loci*," and in the subsequent case of *Battiscombe* v. *Eve* (*c*), the chancellor of the diocese of Rochester held that re-consecration was necessary where the church had been pulled down and rebuilt on the same site. But in the recent case of the Rev. *Edward Parker*, clerk, appellant, *Felix Leach*, respondent (*d*), the judicial committee of the privy council (the lords present being Lord *Westbury*, Sir *J. W. Colville*, and Sir *E. V. Williams*) denied the correctness of Dr. *Lushington's* conclusion, whatever might have been the case in Roman Catholic times, and held that if any portion of the old church remained, re-consecration was not necessary, and they expressed a strong opinion that it would be unnecessary, where the entire church was pulled down and rebuilt under a faculty on the old lines of foundation, and in a subsequent case of *Rugg* v. *The Bishop of Winchester*, Lord *Chelmsford* in giving the judgment of the judicial committee, said that this might well be doubted.

(*a*) *Gardner and another*, apps., *Ellis*, resp., 4 Ecc. 265, L. R. And see *Jackson* v. *Singer*, 37 L. J. Ecc. 9.
(*b*) 1 N. E. C. 368.
(*c*) 9 Jur. (N. S) 210; 17 L. T. (N. S.) 697, S. C.
(*d*) 36 L. J. P. C 26.

Whenever anything is thus legally added to the fabric of the church, utensils, churchyard, or appurtenances, by such consent and license as are requisite thereto, it thenceforth becomes the charge of the churchwardens to take care of it, and they are obliged to repair, amend, and renew it, as need shall be, in the same manner as other particulars belonging to the said church (*e*).

And although a faculty is necessary to authorize any addition to the fabric, ornaments, or furniture of the church; yet, when such addition has once been made, it cannot legally be removed except under the sanction of the ordinary. This cannot be lawfully done without the sanction of the ordinary, even under the authority of the vestry, for the ordinary is the judge what ornaments, &c., are proper (*f*), and the proper authority to order them to be removed (*f*).

It may be well to mention here, that if proceedings are taken by *monition* to compel the removal of unlawful ornaments, &c., the monition must disclose on its face such an interest in the person at whose instance it issued as would have entitled him to institute and carry on a civil suit commenced in the ordinary way by citation, and must therefore contain an allegation that the party taking proceedings has the *status* of a parishioner of the parish.

It may be added that the costs of and incidental to the grant of faculties are regulated by the table of fees made under the authority of 30 & 31 Vict. c. 135 (*g*), and by the provisions of the 14th section of "The Public Worship Regulation Act, 1874" (37 & 38 Vict. c. 85) (*h*), and the rules and orders to be made under that Act.

(*e*) Prid. 51.

(*f*) *Palmer* v. *Episcopum Exon.*, 1 Str. 576; *Ritchings* v. *Cordingly*, 3 Add. & Eccl. 113 L. R.

(*g*) See the "London Gazette" for March 15th, 1869, and *post*, cap. 5. sect. 1, and Appendix.

(*h*) See this section in the Appendix p. xlvi.

As to its not being necessary to obtain a faculty in order lawfully to obey any monition issued under the last-named Act, unless the judge shall direct it to be applied for, see also the said 14th section of the Act.

SECTION VI.

Of Rates for the Repayment of Money borrowed on the Security of Church Rates.

Before the Church Building Acts there was no power in a vestry of a parish to borrow money on the security of the rates; and when money was so borrowed, it was done without any legal security (*a*).

But the Church Building Acts empowered churchwardens to raise money in this way, with the consent of the bishop and incumbent, as well as the vestry, for the enlarging or otherwise extending accommodation, and also for the purpose of repairs (*a*), and as the authority to borrow money on the security of church rates has been extensively acted upon, and money due on the security of church rates, or of rates in the nature of church rates at the time of the passing of the Compulsory Church Rate Abolition Act, 1868, may still be recovered by process of law (*b*), it may be well to refer to the leading enactments on this subject.

By 58 Geo. 3, c. 45, s. 59, it was enacted, "that it shall and may be lawful for the churchwardens of any parish, with the consent of the vestry or select vestry, or persons possessing the powers of vestry, and with the consent of the bishop and incumbent, to borrow and raise upon the credit of the rates of any such parish, such sum or sums of money

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(*a*) *Blunt and Fuller* v. *Harwood*, 1 Curt. 648.
(*b*) 31 & 32 Vict. c. 109, s. 3.

as shall be necessary for defraying the expense, or any part of the expense of *enlarging or otherwise extending* the accommodation in the then existing churches or chapels of such parish, and to make rates for the payment of the interest of such sum or sums of money so to be borrowed and raised, and for providing a fund of not less than the amount of the interest upon the sum advanced for the repayment of the principal thereof, or for repaying such principal in such manner and at such times, and in such proportions, as shall be agreed upon with the persons advancing any such money: provided always, that one-half of the additional accommodation which shall be obtained by any such expenditure, shall be allotted to unenclosed or free seats."

And by section 60, the consent of the majority of the inhabitants and occupiers assessed to the relief of the poor, in vestry assembled, or where any parish shall be under the care and management of any select vestry or other select body, of not less than four-fifths of such select vestry, was made requisite for authorizing these proceedings.

The consent of two-third parts in value of the proprietors of messuages, lands, and tenements within the parish, was made a further requisite by this section; but this enactment was repealed by 59 Geo. 3, c. 134, s. 24, by which it is enacted, "that from and after the passing of this Act, no application or offer to build or enlarge any church or chapel, either wholly or in part, shall be made, nor shall any church or chapel be built or rebuilt or enlarged, or any purchase made of any new or additional burial ground, by means of any rates upon any parish, in any case in which *one-third* part or more in value, such value to be ascertained by an average of the rate for the relief of the poor for the preceding three years, of the proprietors of messuages, lands, and tenements within such parish, whether for estates or freehold or copyhold,

or by virtue of leases for terms of years absolute, whereof not less than fifteen years shall be unexpired, or determinable upon life or lives, shall *dissent* therefrom, such dissent to be entered in the book containing the proceedings of the vestry, and to be signified in case of any future vestry within two months after any resolution for the purposes aforesaid of such vestry or select vestry as aforesaid, and in case of any vestry already holden, at which such resolutions shall have been passed, within two months from the passing of this Act, under the hands of such proprietors and persons interested as aforesaid, and in cases of corporations aggregate, under the hand of the president, head, or chief member thereof for the time being, and in case of *femes covert*, minors, insane persons, and persons absent from the kingdom, under the hands of their respective husbands, guardians, committees, trustees, attorneys, or agents, who are hereby respectively authorized to sign such dissents, and in cases of trustees of charitable institutions, under the hands of the major part of the trustees, or of any such body of any such trustees as may, under their respective trusts, be authorized to act in the execution of their trusts."

But by section 25 it was provided, "that it shall be lawful for the inhabitants of any parish who shall be assembled and present at any vestry, or the major part of the inhabitants so assembled and present at any such vestry, of which notice shall have been given upon two successive Sundays preceding the meeting of such vestry, or for two-third parts of such of the persons exercising the powers of vestry in such parish, as shall be assembled at any meeting of which due notice shall have been given according to the mode of giving notices for the assembling of such persons, to order and direct the making and raising of any rate not exceeding the amount of one shilling in the pound in any

one year, or the amount of five shillings in the pound in the whole, upon the annual value of the property in the parish, for the purpose of building or enlarging any church or churches, or chapel or chapels, either wholly or in part, by means of rates, without any further or other or greater number of consents of any inhabitants or proprietors * * * * * Provided always, that no greater or larger rate than aforesaid shall be ordered or directed to be made or raised, in relation to any application or offer to enlarge or build any church or chapel, either wholly or in part, by means of rates, if any such proportion of dissents as are in this Act specified are signified in writing in manner directed by this Act."

It may be mentioned here that in the case of *R.* v. *The Churchwardens of St. Mary, Lambeth* (*a*), it was argued that this section prohibited the levying of rates exceeding in the whole five shillings in the pound on the annual value of property in the parish, for the repayment of money borrowed under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, on the security of church rates ; but the Court held that the clause had no such effect, and that it did not even refer to money lent under those statutes on the security of church rates.

It will be observed, that 58 Geo 3, c. 45, s. 59, relates only to *the enlarging or otherwise extending accommodation.* By other sections (*b*) of the Act provision was made for borrowing money in certain events, and upon certain conditions, on the security of church rates, for the *building* of *new* churches ; but no power was given by that Act for

(*a*) 7 L. T. 203.

(*b*) Sects. 14, 60, and 61, amended, and in part repealed by 59 Geo, 3, c. 134, s. 24, regulating the requisite consents, *ante*, p. 205, and s. 75, requiring one fifth of the whole of the sittings to be "free seats" for the poor,

raising money on the security of church rates, for the purpose of *repairs*.

This desirable object was secured by 59 Geo. 3, c. 134, s. 14, by which it is enacted, "that it shall and may be lawful for the churchwardens of any parish, with the consent of the vestry, or persons possessing the powers of vestry, and with the consent of the bishop and incumbent, to borrow and raise upon the credit of the church-rates of any such parish, such sum or sums of money as shall be necessary for defraying the expenses of *repairing* any churches or chapels, and they are hereby empowered and *required*, in any case in which such sums shall have been borrowed, to raise by rate a sum sufficient from time to time, to pay the interest of the money so borrowed, and not less than ten *per cent.* of the principal sum borrowed, out of the produce of such rates, until the whole of the money so borrowed shall be repaid" (*a*).

By this and subsequent Acts the building and rebuilding of churches upon certain conditions in part or in whole by the means of money raised on the security of church rates were further provided for.

Thus under this Act (*b*) the churchwardens of any parish were authorized, when it should be necessary or expedient for the purpose of extending or increasing the accommodation in the parish church, with the consent of vestry, ordinary, patron, incumbent, and lay impropriator, if there were one, to pull down and rebuild the church on the same or a more convenient site; and to borrow money on the security of church rates for this purpose, subject to the provisions in sects. 24, 25; one-half of the additional seats to be free seats.

(*a*) 5 A. & E. 10; *Blunt and Fuller* v. *Harwood*, 1 Curt. 641; see *post*, c. 3, s. 2.

(*b*) 59 Geo. 3, c. 134, s. 40.

By this Act, also, the power of borrowing money on the security of church rates, for the purposes of these Acts, was extended to townships, hamlets, vills, chapelries, and other divisions of parishes (*c*).

By 3 Geo. 4, c. 72, s. 5, the *commissioners* were authorized to lend money for the purposes of the above Acts, on the security of the church rates; and by sect. 6, money might be raised by the churchwardens for the same purposes by the grant of annuities.

Again, by 5 Geo. 4, c. 103, a power was given, upon certain conditions, for building churches or chapels by private subscriptions, or partly by subscription and partly by rates, or money raised on the credit of the rates (*d*).

It should be added that by 5 Geo. 4, c. 36, a statute passed for amending and rendering more effectual the several Acts for the issuing of Exchequer bills for public works, a power was given to the churchwardens or chapelwardens and *overseers of the poor* of any parish in *England* or *Wales*, on certain conditions, to borrow money from the commissioners of public works, on the security of rates in the nature of church rates (which they were by the said Act directed and required to make), for defraying the expense, or any part of the expense of rebuilding, repairing, enlarging, or otherwise extending the accommodation in any church or chapel of any such parish, or of any district or division thereof respectively (*e*).

And by the second section of this statute it is enacted that it shall be lawful for any churchwarden or chapelwarden, or overseer of or in any parish or district or division of any parish, in which any rates shall be made under the provisions of this Act, to collect, demand and receive, sue for, levy and recover all such rates by all such ways and means

(*c*) 59 Geo. 3, c. 134, s. 40.
(*d*) Sects. 5, 6, 9, 10.
(*e*) See s. 1.

as any church rates may by law be collected, demanded received, sued for, levied and recovered as fully and effectually as if all powers, authorities, provisions, penalties and forfeitures, relating to the collecting, demanding, suing for, levying, receiving and recovering of any church rates, or relating to any refusal to pay any like rates were specially repeated and enacted in this Act.

In like manner by section 3 authority was given to the churchwardens and overseers of any parish authorized by any Act specially applicable to such parish to make and levy rates for defraying the expense of building any new church or chapel in such parish, to borrow the money of the commissioners on the security of such rates, provided such rates should be sufficient to secure the repayment of any sum advanced with interest at 4 per cent., within twenty years from the date of such advance, the repayment to be secured by mortgage or assignment of the rates in such manner and form as the commissioners should think proper and direct.

It has been held that the "chancel" is included under the word "church" in this statute, and that money might lawfully be lent by the commissioners under it for the repair of the whole church, including the chancel (*a*).

In order to render a rate under the authority of any of these statutes valid the requisites of the Act must have been strictly complied with (*b*). But if this has been done, and the money has been properly advanced for a lawful object, no subsequent expenditure of a part of the money advanced on an improper object can by any retrospective effect invalidate the security (*c*).

(*a*) *Reppin* v. *Baston*, 2 Ad. & Ec. 386; and see *Smallbones* v. *Edney and Lunn*, 21 L. T. (N. S.), 506.

(*b*) *R.* v. *Churchwardens of Dursley*, 5 A. & E. 20; *Blunt and Fuller* v. *Harwood*, 1 Curt. 648, *post*, c. 3, s. 3, *Williams* v. *George and Nunn*, 3 Curt. 343; 2 N. E. C. 85, S. C.; *R.* v. *Willim and Cross, Chapelwardens of Bilston*, 16 Q. B. 1.

(*c*) 2 Ad. & E. (L. R.) 386.

CHAPTER III.

ON COLLECTING THE RATE, AND HEREIN ON THE METHODS OF ENFORCING THE PAYMENTS OF CHURCH RATES IN THOSE CASES IN WHICH THEY CAN STILL BE ENFORCED; ON THE VARIOUS GROUNDS OF RESISTING PAYMENT; AND ON THE LIABILITY OF THE PARISHIONERS IN RESPECT OF NECESSARY REPAIRS.

SECTION I.

On Collecting the Rate, with some observations on the Compulsory Recovery of Rates made under private and local Acts of Parliament within the meaning of the fifth section of the Compulsory Church Rate Abolition Act, 1858.

When the rate has been made the churchwardens should lose no time in endeavouring to collect from the different ratepayers the amounts at which they are severally assessed, and with this view they should forthwith serve on the respective ratepayers demands in writing of the exact amounts at which they are so assessed, and this should equally be done, whether the rate be a common law church rate, or whether it be a church rate, or a rate in the nature or in the name of a church rate made under the authority of the Church Building Acts or of any other statute.

And in their endeavours to collect the rate they will, of course, not lose sight of the seventh section (*d*) of the Com-

(*d*) See p. 90.

pulsory Church Rate Abolition Act, 1868, which authorizes bodies corporate, trustees, guardians, and committees, to pay any church rate (*a*) made in respect of the property occupied by them or their *cestui que trust* (*b*).

Nor should they lose sight of the eighth section of that Act, which authorizes the *owners* in certain cases to pay the rate (*c*); and with the view of availing themselves to the utmost of the benefit of this section, they are advised in all ordinary cases where the occupier shall have made default for one month after demand in payment of the rate, to give the owner a notice in writing signed by them, and stating the amount at which the occupier is assessed the date of the demand of payment, the default in payment by the occupier, and that by virtue of the eighth section of the "Compulsory Church Rate Abolition Act, 1868," the owner is entitled to pay the rate, and thereupon, until the next succeeding church rate is made, to stand for all purposes relating to church rates (including the attending at vestries and voting thereat), in the place of the occupier.

Indeed, the churchwardens are advised to make all reasonable endeavours in their power to collect the rate by their voluntary payment from the occupiers, and other persons authorized by the statute to pay it; but when they have done this, they will have done all towards the collecting of the rate, which in ordinary cases they are able to do.

But if the rate were made before the passing of the Compulsory Church Rate Abolition Act, 1868, or if it be a rate made within the provisions of the third or fifth section of that Act the churchwardens may proceed to enforce payment of it by process of law.

(*a*) See the interpretation of the words "church rate," as used in the Act, sect. 10, p. 92.

(*b*) See p. 90.

If the rate be one within the provisions of the 5th section made under the authority of a private or local Act, the making as well as the recovery of the rate will of course be regulated by the particular Act, the provisions of which must be consulted for the guidance of the churchwardens or other persons authorized to make and recover the rate respectively.

But it may be mentioned that in most of these statutes, so far as the author is aware, an appeal against the rate is given to the Court of Quarter Sessions, and the payment of it enforceable by distress warrant, and, where this is the case, the magistrates, upon an application for a distress warrant, have simply to see that there is such a rate, as alleged, good upon the face of it, that the party summoned is the person named in the rate, and that he has not paid his assessment;—after which the duties of the magistrates are simply ministerial (*c*), they have no power to inquire into the validity of the rate (*d*), they cannot even refer to the estimate for this purpose, for the estimate is no part of the rate (*e*), nor can they state a case for the opinion of one of the superior courts at Westminster upon the validity of the rate under the 20 & 21 Vict. c. 43, (*f*).

The proper steps to be taken for the recovery of common law church rates in those cases in which the payment of them may still be compulsorily enforced, and for the

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(*c*) Ex parte *May*, 2 B. S. 425; 31 L. J. (M. C.) 161.

(*d*) Ex parte, *May*, supra; *Wilson and others*, apps., v. *The Churchwardens of Sunderland-near-the-Sea*, resps.; 34 L. J (M. C.) 90.

(*e*) So ruled by the Court of *Queen's Bench* in the recent case of ex parte, *Stafford*. See page 93.

(*f*) Ex parte, *May*, supra; *Sweetman*, app., *Guest*, resp., 3 L. R. Q. B. 262. It was held also in this case, *post*, that the 11th section of 11 & 12 Vict. c. 43, limiting the time for taking proceedings does not apply to a distress warrant.

recovery of rates made under the Church Building Acts, and also under the statute of 5 Geo. 4, c. 36 (*a*), which are in all respects to be sued for and recovered as if they were common law rates, will form the subject of the next two sections.

But it may be well to suggest here that before taking hostile proceedings against the defaulting parishioner, the churchwardens should furnish him with all reasonable information which he may require respecting the rate, and it should be borne in mind by those who have the custody of the vestry books (*b*), that he has a right to inspect the minutes of the vestry at which the rate was made, and may enforce this right, if necessary, by *mandamus* (*c*)

SECTION II.

On the Summary Proceedings before Justices of the Peace for enforcing Payment, of Church Rates.

At common law, the proceedings for the recovery of a church rate must, in all cases, have been taken in the *Ecclesiastical Courts*, for there only this matter was cognizable (*d*) ; and so is the law declared by a celebrated statute of King Edward I., called the statute *circumspecte agatis* (*e*).

But, in consequence of the delay and expense necessarily incident to suits in the *Ecclesiastical Courts*, the legislature has, in certain cases, provided for the recovery of church rates by summary proceedings before justices of the peace.

(*a*) See sects. 2, 3, *ante*, pp. 209, 201.
(*b*) See 58 Geo. 3, c. 69, s. 6.
(*c*) *R.* v. *The Churchwardens of Stepney*, 11 J. P. 420.
(*d*) Prid. 67, 68; Gibs. Cod. 219; Degg. 171 P. 1, c. 12; 3 Black. Com. 92; *Jeffries' case*, 5 Rep. 66; *Burder* v. *Veley and another*, 12 A. & E. 233; P. & D. 425, S. C.
(*e*) 13 Edwd. 1, st. 4.

These enactments may be divided into two classes:—

First, those which give a summary remedy against *all* persons.

Secondly, those which are confined in their operation to *Quakers* only.

By 53 Geo. 3, c. 127, s. 7, (*f*) for the more easily and speedily recovering church rates or chapel rates of limited amount, it is enacted that "if any one duly rated to a church rate or chapel rate, the validity whereof has not been quest ioned in any *Ecclesiastical Court*, shall refuse or neglect to pay the same sum at which he is so rated, it shall and may be lawful for any one justice of the peace of the same county, riding, city, liberty, or town corporate, where the church or chapel is situated in respect whereof such rate shall have been made, upon complaint of any churchwarden or churchwardens, chapelwarden or chapelwardens, who ought to receive and collect the same, by warrant under the hand and seal of such justice, to convene before any two or more such justices of the peace any person so refusing or neglecting to pay such rate, and to examine upon oath into the merits of the said complaint, and by order under their hands and seals to direct the payment of what is due and payable in respect to such rate, so as the sum ordered and directed to be paid as aforesaid do not exceed 10*l.* over and above the reasonable costs and charges to be ascertained by such justices; and upon refusal or neglect of such party to pay according to such order, it shall and may be lawful for any one of such justices, by warrant under his hand and seal, to levy the money thereby ordered to be paid, together with the

(*f*) This section is now expressly repealed, except as to any rate, the payment of which may still be enforced by process of law, by "The Statute Law Revision Act, 1872," 36 & 37 Vict. c. 91.

amount of such costs and charges, by distress and sale of the goods of such offender, his executors or administrators, rendering only the overplus to him or her, the necessary charges of distraining being thereout first deducted and allowed by the said justices; and any person finding him or herself aggrieved by any judgment given by two or more such justices, may appeal to the next general quarter sessions to be held for the county, riding, city, liberty, or town corporate wherein such church or chapel is situated in respect whereof such rate shall have been made, and the justices of the peace then present, or the major part of them, shall proceed finally to hear and determine the matter, and to reverse the said judgment, if they shall see cause; and if the justices then present, or the major part of them, shall find cause to affirm the judgment given by the first two or more justices, the same shall be decreed by order of sessions, with costs against the appellant, to be levied by distress and sale of the goods and chattels of the said party appellant.

"Provided always, that nothing in this Act contained shall extend to alter or interfere with the jurisdiction of the *Ecclesiastical Courts* to hear and determine causes touching the validity of any church rate, if the same shall exceed the sum of 10*l.* from the party proceeded against.

"Provided likewise, that if the validity of such rate, or the liability of the person frrom whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices the justices shall forbear giving judgment thereupon, and the person or persons so demanding the same may then proceed to the recovery of their demand according to due course of law, as heretofore used and accustomed: provided likewise, that nothing herein contained shall affect any regulations that may have been made by authority of parliament respecting

the church rates or chapel rates of any particular parish or district."

Under this statute the complaint is to be laid by the churchwarden or churchwardens, chapelwarden or chapelwardens, who ought to receive and collect the rate, that is, in ordinary cases by the lawful churchwardens of the parish, upon their *joint* complaint (*a*); but where the acting churchwardens of the parish are churchwardens *de facto* only, and not *de jure*, the complaint may be legally laid by such churchwardens *de facto* (*b*); and where there are by custom several churchwardens in a parish each acting for a separate district, the churchwarden of the district in respect of which the rate is payable may make the complaint (*c*).

(*a*) Prid. 131, 132. That the proper parties to take these proceedings, where there has been a change of officers since the making of the rate, are the churchwardens at the time of complaint made, and not those who were churchwardens at the time of the making of the rate, see *R.* v. *Bidwell*, 1 Den. C. C. 223; 17 L. J. M. C. 99, S. C.; and see *post*, c. 5, s. 3.

(*b*) *R.* v. *Inhabitants of St. Clements*, 12 A. & E. 177; S. C. nom.; *R.* v. *Ipswich JJ.*, 3 P. & D. 481. In this case the appointment of the churchwardens was bad *in law*, in consequence of the notice of the vestry meeting at which they were elected not having been duly given. As to churchwardens *de facto* and the validity of their acts, see *supra*; and see *Turner and another* v. *Baynes*, 2 H. Black. 559; *Butt* v. *Fellowes*, 3 Curt. 680; *Lorant and another* v. *Scadding*, in error, 13 Q. B. 706; *Scadding* v. *Lorant*, Dom. Proc. 3 H. of L. Cas., 418. See also as to the validity of the acts of officers *de facto*, 16 Vin. Abr. 114, tit. "Officer and Officers," (G. 4) *R.* v. *The Inhabitants of Leominster*, 5 Q. B. 640.

(*c*) *R.* v. *Fenton and others*, 1 Q. B. 480. It would seem, indeed, from this case, that the complaint may *always* be made by one churchwarden. Lord *Denman*, C. J., in giving judgment, said, "the words of the statute" (any *churchwarden* or churchwardens) "are not to be got over," and *Patteson*, J., "here the words are *churchwarden or churchwardens*."

The complaint of the churchwardens may, therefore, be made before *one* justice, and the warrant to convene the party before the justices issued by such single justice.

As the foundation for these proceedings is the refusal or neglect to pay the rate, a demand of payment should in all cases be made before proceeding under the statute, and the prudent course, even supposing it not to be absolutely necessary in point of law, is to demand the exact sum due (*a*).

The churchwardens must moreover be careful to make their complaint within the time limited by law, which, as there is no time specially limited by the statute for making it, is regulated by the 11th section of 11 & 12 Vict. c. 43 (*b*), by which it is enacted "that in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

Now, the matter of complaint in this case being the refusal or neglect to pay, the complaint must of course be laid within six calendar months from the time of such refusal or neglect, and as the magistrates will be justified in infer-

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(*a*) See *Hurrell* v. *Wick*, 8 Taunt. 369. But *quære*, whether this is absolutely necessary that the demand should specify the amount if the ratepayer is aware of the amount and does not object to it. See *R.* v. *Ford and others*, 2 A. & E. 588. That a misstatement as to the date will not invalidate the demand, if the rate is sufficiently designated, see *R.* v. *Stretfield and Dixon*, 3 L. J. M. C. 236; and see *Ormerod and another* v. *Chadwick and another*, 16 M. & W. 367.

(*b*) The Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions within England and Wales with respect to summary Convictions and Orders.

ring from the mere fact of non-payment after demand a neglect, if not a refusal, from the time of such demand (*c*), the complaint should in all cases be made within six calendar months from the time of the demand.

It would seem, moreover, from the case of *R.* v. *Mirehouse* (*d*), that the ratepayer may waive the necessity of a formal demand of the sum due (supposing it to be necessary), and indeed of the demand altogether, by a voluntary notice to the churchwardens that he refuses to pay the rate. In that case the collector had called at the ratepayer's mill and asked his son for payment of his father's rate ; he had the receipt book with him, but he did not produce the receipt, nor did he mention the amount of the rate. The son, by the authority of his father, refused to pay the rate, and gave the collector a written paper stating that he refused to pay it. It was argued in support of the order that the demand was insufficient for two reasons : *first*, because it was made on the son and not on the father ; and *secondly*, because the amount due was not demanded: but the Court held that the refusal to pay the rate by the authorized agent of the ratepayer was a sufficient refusal within the meaning of the Act, and as more than six calendar months had elapsed between the refusal and the complaint, they made the rule absolute for a *certiorari* to bring up the order for payment of the rate, and ultimately quashed the order.

So that the safe and proper course in every case will be to make the complaint within six calendar months from the time of demand or refusal, whichever shall first happen ; but where there shall have been a refusal without any previous demand, the churchwardens are recommended

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(*c*) *R.* v. *Shrewsbury JJ.*, 31 L. T. 114.
(*d*) *R.* v. *Mirehouse*, 1 L. T. (N. S.) 32; and see *R.* v. *Ford and others*, 2 A. & E. 588.

forthwith to fortify their case by a formal demand before making their complaint, taking care, at the same time, to make their complaint within six calendar months from the time of the refusal.

Before the justice issues the warrant he has a right to call for the production of the rate, in order that he may be satisfied that the rate is good upon the face of it, and that it is a church rate only which he is called upon to enforce; and if the rate is not produced, or being produced is open to objection on this ground, as where it purports to have been made for and towards the repairs of the church and *other incidental charges of the parish*, without saying legally chargeable to the church rate or the like, he will be justified in refusing his warrant, and the Court of *Queen's Bench* will not compel him to issue it (*a*).

In order to give the magistrate jurisdiction it must moreover be made affirmatively to appear before him that the amount does not exceed 10*l.* and that no question is made on the rate in any *Ecclesiastical Court;* for the object of the statute is to give a remedy by summary application in the case of a church rate withheld, but not to invest justices of the peace with a power which belongs exclusively to the *Ecclesiastical Court*,—that of deciding the validity of a rate, or the liability of the person to pay it (*b*).

It seems from the case of *R.* v. *Sillifant* (*c*) that the fact of the validity of the rate having been disputed in an *Ecclesiastical Court* by *any* person, although that Court may have decided against the party opposing the rate, is sufficient to prevent the jurisdiction of the justices from

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(*a*) *R.* v. *Byrom and another*, 12 Q. B. 321; and see *R.* v. *The Eastern Counties Railway Company and the Overseers of Moulton*, 25 L. J. M. C. 49, and *R.* v. *Crook*, supra.

(*b*) *R.* v. *Chapelwardens of Milnrow*, 5 M. & S. 248.

(*c*) 4 A. & E. 354; 5 N. & M. 640.

attaching; but the express point cannot be considered to have been settled in that case, for all that was decided there is, that the question was open to doubts, and for that reason (among others) the Court of *King's Bench* refused a *mandamus* to the justices of the peace, to compel them to make an order for payment of the rate.

Indeed the case of *Richards* v. *Dyke* (*d*), may, perhaps, be thought to warrant a different inference, for in that case a prohibition was granted to restrain the Court *Christian* from enforcing an undisputed church rate under 10*l.*, on the ground that the Court *Christian* had no jurisdiction, and that the proceeding ought to have been taken before the justices, the plaintiff in prohibition apparently relying upon the mere fact of the rate not having been disputed or denied by *him;* but the point was not directly raised in argument, the whole argument and the judgment of the Court turning upon the question of concurrent jurisdiction.

But the churchwardens are not prevented from proceeding before the justices in consequence of their having commenced proceedings against the party in the *Ecclesiastical Court* for the rate, provided they have abandoned the suit, and he has not disputed therein the validity of the rate, or his liability to pay it (*e*).

The examination into the merits of the complaint must be before *two* justices at least, and the order for payment of the money due must be under the hands and seals of both; but if the party gives notice to the justices that he disputes the validity of the rate, or his liability to pay it, the jurisdiction of the justices is ousted, though no proceedings may actually have been taken in the *Ecclesiastical Court*,

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(*d*) 3 Q. B. 256; 2 G. & D. 493.

(*e*) *R.* v. *Ipswich JJ.*, 3 P. & D. 481; S. C. nom. *R.* v. *Inhabitants of St. Clement's*, 12 A. & E. 177.

and any expression by him manifesting that he disputes the rate *bonâ fide* will be a sufficient notice for this purpose (*a*).

A mere statement, however, to the justices by the party complained of that he disputes the rate, and that he has entered a *caveat* in the *Ecclesiastical Court*, against its being allowed, is not sufficient; for the justices must still hear and examine, to ascertain whether the rate is *bonâ fide* disputed (*b*).

And if the evidence should be such as reasonably to warrant the conclusion that the validity of the rate is not *bonâ fide* disputed, as, for example, if the alleged grounds for disputing it are absurd (*c*) or *palpably* frivolous (*d*), or not true in fact (*e*), they will be justified in making the order. But it must be remembered that what the justices are to determine is the *bonâ fides* of the objection, not the *validity* of it; and if the objection is *bonâ fide*, their jurisdiction is gone, and they are bound to forbear giving judgment (*f*).

And although the magistrates are to decide in the first instance whether the validity of the rate is *bonâ fide* disputed or not, yet they cannot, without any evidence to warrant it, give themselves jurisdiction to make the order by coming to the conclusion that it is not *bonâ fide* disputed, for

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(*a*) *R.* v. *Chapelwardens of Milnrow*, 5 M. & S. 248. And see the judgments of *Wightman*, J., and *Blackburn*, J., in *Pease and others* v. *Chaytor and another*, 3 B. & S. 620.

(*b*) *R.* v. *Wrottesley and another*, 1 B. & Ad. 648. And see *R.* v. *Wakefield*, 1 Bur. 485.

(*c*) See per *Coleridge*, J. in *R.* v. *Nunneley* E. B. & E. 852; 23 L. J. M. C. 266.

(*d*) See per *Wightman*, J., in *Pease and others* v. *Chaytor and and another*, 3 B. & S. 620; 32 L. J. M. C. 121. *R.* v. *Blackburn and another and James Crofts*, 32 L. J. M, C. 41.

(*e*) *R.* v. *Blackburn and another and James Crofts*, supra.

(*f*) See *R.* v. *Collins and another, JJ. of Durham*, 13 Q. B. 861.

for they cannot give themselves jurisdiction by erroneously and capriciously deciding contrary to the truth upon the question on which their jurisdiction depends; and if in such case, though in the honest belief that the validity of the rate is not *bonâ fide* disputed, they proceed to make the order the Court of *Queen's Bench* will bring it up by *certiorari* and quash it (*g*).

Thus in the above-mentioned case of *R.* v. *Crook* (*h*), the justices, believing the objections insisted upon to be frivolous, and that the defendant was not acting *bonâ fide*, made an order for payment of the rate; but the Court of *Queen's Bench* held that the order could not be sustained, for although some of the objections were of that character, there were others which might well be made by a reasonable man. The magistrates had no doubt acted fairly and conscientiously, but not reasonably, when they said the party did not *bonâ fide* dispute the validity of the rate (*i*).

The rate in question had been made by the churchwardens out of vestry on the second of June, in pursuance of a resolution of the vestry of the eighth of February preceding, that a rate should be made for the necessary repairs of the church;—it purported by its heading to have been made for the necessary expenses of the church, and for other necessary expenses relating to the improvements of the church. A sum of 8*l.*, intended to be covered by the

(*g*) See *R.* v. *Nunneley*, E. B. & E. 852, and especially the judgment of *Campbell*, C. J. And see *R.* v. *Collins and another, Durham JJ.*, 17 Q. B. 816. In that case *Coleridge*, J., is reported to have said, "I do not agree that they" (the justices) "were conclusively the judges whether or not the rate was disputed *bonâ fide*. It would still be for a jury to settle that point if the matter came before them."

(*h*) Q. B. Sittings after H. T. 1857, M.S. *supra*, pp. 169, 194.

(*i*) And see *R.* v. *Collins and another, JJ. of Durham*, 17 Q. B. 816; 31 L. J. M. C. 73, *supra*, p. 222, *post*, p. 225.

rate, had been paid by the churchwardens between the dates of the resolution and of the making of the rate, and there was a question whether the sum had not become due before the resolution was made. Among the objections to the rate were the following :—1. That the rate appeared by its heading to have been made for improvements as well as repairs, whilst the resolution of the vestry only authorized a rate for repairs (*a*) : 2. That a fatal delay had occurred in the making of the rate, the churchwardens having allowed their year of office to expire and a change of inhabitants to take place before the rate was made, instead of following up the authority of the resolution of the vestry forthwith, and making the assessment on all who were originally liable : 3. That the rate was retrospective : 4. That the sequestrator had not been assessed for the tithe commutation rentcharge. The *Court* said that the last-mentioned objection was manifestly frivolous ; but without giving a decided opinion on the others, they pronounced them to be very formidable, and such as a man might reasonably insist upon.

And where one of the objections was that the validity of the previous rate was then in litigation in the *Ecclesiastical Court*, and that a sum of money had been included in the rate for the expenses of the churchwardens in the suit there pending, the Court held that, as the suit was not ended, the defendant had a right to dispute the rate,—that it was clear that he disputed it *bonâ fide*,—and quashed the order (*b*).

If the defendant *bonâ fide* disputes the validity of the rate, the jurisdiction of the justices is gone, although he

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(*a*) *Vide supra*, p. 194.

(*b*) *R.* v. *Huntsworth*, 33 L. J. M. C. 131; 10 L. T. (N. S.) 374, S. C. See also *R.* v. *Pedler*, 12 L. T. (N. S.) 17.

may not intend to dispute the rate in the *Ecclesiastical Court.* Thus, where the defendant gave the justices notice that he should not contest the validity of the rate in the *Ecclesiastical Court*, but that he would commence actions in the courts of common law against them, and all persons concerned therein, for all acts connected with the said rate which he should be advised were illegal,—it was held that this was sufficient to take away the jurisdiction of the justices (*c*).

So, where the defendant gave the justices notice that he disputed the validity of the rate, and specified his objections; whereupon the justices adjourned the application for a month, to admit of his taking steps in the meantime to try the validity of the rate, and on his failing to do so made an order for payment of the money, but subsequently refused to issue their distress warrant without the authority of the Court of *Queen's Bench;* that Court refused to interfere, on the ground that the justices had no right to impose on the defendant as a test of *bonâ fides*, the impossible condition of taking proceedings to try the validity of the rate, and that there appeared to be no reason to disbelieve the *bonâ fides* of his objections to the rate (*d*).

Even where the defendant is not really acting *bonâ fide*, he will be estopped in all subsequent proceedings from denying that he did so act, if his conduct and language before the magistrates are such as to justify them in the belief that he does *bonâ fide* deny his liability, and to induce them in consequence to forbear giving judgment in the matter (*e*).

(*c*) *Dale* v. *Pollard*, 10 Q. B. 504.

(*d*) *R.* v. *Collins and another, Durham JJ.*, 21 L. J. M. C. 73; 17 Q. B. 816.

(*e*) See *Robinson* v. *Purdy*, 16 M. & W. 11.

If the defendant *bonâ fide* disputes the rate, it is apprehended that the jurisdiction of the justices is equally ousted, although an *Ecclesiastical Court* may already have decided against the validity of the alleged objection (and this, independently of the consideration whether the fact of the validity of the rate having been already questioned in the *Ecclesiastical Court* is sufficient to prevent their jurisdiction from attaching), for the party objecting may still be acting *bonâ fide*, and intend, if necessary, to carry the matter before a court of appeal.

But if the rate has been made by a vestry duly convened, and is good upon the face of it, and has not been questioned in any *Ecclesiastical Court*, or disputed by the defendant before the justices so as to take away their jurisdiction, they should proceed to make the order without further inquiry into its validity; for, "a rate duly made within the meaning of 53 Geo. 3, c. 127, s. 7, is a rate valid on the face of it, and which has not been disputed before the justices or in the *Ecclesiastical Court*—the words of that Act are satisfied, if the rate on the face of it, and without extraneous circumstances, would be a valid rate—in order to invalidate the rate by extraneous circumstances the party must go to the *Ecclesiastical Court*" (*a*).

It should be mentioned here that if the ratepayer invites the decision of the justices upon the validity of the rate, instead of so disputing it as to show that he declines their

(*a*) Per *Alderson*, B., in *Ramsbottom* v. *Duckworth*, 1 Exch. 536. *Pollock*, C. B., in the same case is made to say, "I think it sufficiently appears that the rate was duly made; that is, made by competent authority, and, if not objected to, capable of being enforced;" and *Rolfe*, B., that the rate is "duly made, if made in such a manner that the magistrates are bound to act." See, further, as to the duty of the justices to proceed with the hearing if the rate is good upon the face of it, the observations of Sir *W. W. Follett*, in *R.* v. *Sillifant*, 4 A. & E. 354; 5 N. & M. 540, S. C.

jurisdiction, and the justices overrule his objections, and he thereupon gives notice that he *bonâ fide* disputes the validity of the rate, but they nevertheless make the order for payment of the rate, the Court of *Queen's Bench* will not grant a *certiorari* for the purpose of quashing it; for the writ of *certiorari* is a discretionary writ, and a party who has asked for the decision of the case, and has led the justices to give their decision, cannot be allowed to ask the Court for a *certiorari* to quash the order (*b*).

But if the validity of the rate was in fact disputed before the justices, and they forbore giving judgment in consequence, or having made the order refused to issue their distress warrant, the Court of *Queen's Bench* will not compel them, in the one case to make the order, or in the other to issue their distress warrant, for as the validity of the rate was disputed before them, and they necessarily therefore had notice that it was disputed, they ought to have forborne from making the order, since mere consent could not give them jurisdiction (*c*).

And where the validity of the rate was disputed, and the justices nevertheless proceeded to make the order; but, before it was formally drawn up the order was withdrawn, and notice of the withdrawal given to the defendant, it was held that the churchwardens might sue for the rate in the *Ecclesiastical Court* without taking any steps to quash the proceedings before the justices (*d*).

It will be sufficient in the order of justices for payment of the rate to describe the rate as "the churchwardens'

(*b*) *R.* v. *Salop JJ.*, 29 L. J. M. C. 39; *R.* v. *Knox and others*, 32 L. J. M. C. 257.

(*c*) See ex parte *Mannering*, 1 B. & S. 431; *R.* v. *Leicester and Compton JJ.*, 29 L. J. M. C. 203.

(*d*) *Linnell and Walker* v. *Gunn*, 1 Law Rep. Ecc. 365; 36 L. J. Ecc. 23, S. C.

rate," for there are no set words required by statute or by the common law to describe a church rate (*a*).

If the party, after service of the order upon him, refuse to pay the money, the warrant to distrain may be made under the hand and seal of *one* justice.

By 54 Geo. 3, c. 170, s. 12, the goods and chattels of any person neglecting to pay any sum assessed on him for any church cess for seven days after demand made may be distrained, not only within the district, parish, township, or hamlet in which it is made, but also within any other district, &c., within the same county, riding, division, or jurisdiction ; and if sufficient distress cannot be found within the said county, &c., then on oath thereof made before ony one or more justice or justices of the peace of any other county, &c., in which any of the goods or chattels of such person shall be found, which oath such justice or justices shall administer and certify by indorsing his or their name or names on the warrant granted to make such distress, such goods, &c., shall be liable to such distress and sale in such other county, &c., and may under such warrant and certificate be distrained and sold, as if found within the district, parish, &c., in or for which the rate was due.

By 57 Geo. 3, c. 93, s. 1 (extended *inter alia* to church rates, so far as the same are applicable and capable of being put into execution, by 7 & 8 Geo. 4, c. 16), the costs of the distress where the sum demanded and due does not exceed 20*l.* are limited to those in the schedule to 57 Geo. 3, c. 93, thereunto annexed : and no person may charge for anything mentioned in such schedule, unless it be really done ; and by sect. 2, if he levies, takes, or retains from the produce of the goods sold under the distress any other or greater

(*a*) *R.* v. *Crook*, Q. B. Sittings after H. T. 1857, MS.

charges than are mentioned in the schedule, or makes any charges for anything mentioned in such schedule and not really done, he may be adjudged by a justice to pay treble the amount unlawfully taken.

The following costs are specified in this schedule :—

"Levying distress, 3*s.*

"Man in possession, 2*s.* 6*d.*

"Appraisement, whether by one broker or more, 6*d.* in the pound on the value of the goods.

"Stamps, the lawful amount thereof.

"All expenses of advertisements, if any such, 10*s.*

"Catalogues, sale and commission, and delivery of goods, 1s. in the pound on the net produce of the sale" (*b*).

The appraisement is not authorized in cases of church rate ; but where it was *bonâ fide* made and paid for, it was held that the person charged with the execution of the warrant of distress was not liable to be convicted under sect. 2 of 57 Geo. 3, c. 93, as he had acted *bonâ fide*, and the charge is mentioned in the schedule (*c*).

General forms of orders to pay, and of warrants of distress, which may be applied to the particular case under consideration, are given by 11 & 12 Vict. c. 43, and the various proceedings for recovery of the rate are now for the most part regulated by that statute, which was passed to facilitate the performance of the duties of justices of the peace out of sessions within *England* and *Wales* with respect to summary convictions and orders. For the details the statute itself must be referred to ; but it may be men-

(*b*) See Tyrwhitt, Prid. 93, 96, n.

(*c*) *Nott*, app., *Bond*, resp., 1 Q. B. 405, L. R. It was further held in this case that a previous sale of the goods seized by private contract, which had been rescinded by consent, did not exhaust the warrant so as to invalidate the subsequent proceedings under it.

tioned here that by the 19th section increased facilities are given for executing the warrant of distress, both within and without the jurisdiction of the justice granting it ; and by the 22nd section a power is given, in the event of its being returned to the warrant of distress that no sufficient goods of the defendant can be found, to commit him to prison for any term not exceeding three calendar months, unless the sum or sums adjudged to be paid, and all costs and charges of the distress, and of the commitment and conveying of the defendant to prison (the amount thereof being ascertained and stated in such commitment), shall be sooner paid, a provision which may fairly be acted upon, wherever it shall appear that the defendant has fraudulently concealed or made away with any of his goods for the purpose of evading payment of the money.

This statue repeals so much of the Act 27 Geo. 2, c. 20, ss. 1, 2, intituled "An Act for the more easy and effectual proceeding upon Distresses to be made by Warrants of Justices of the Peace" as relates to such distresses. By the 1st section it was provided that the warrant for non-payment of money under an order of justices should direct the goods to be sold within a certain time, to be limited in the warrant, so as such time be not less than four days, nor more than eight, unless the money for which such distress shall be made, together with the reasonable charges of taking or keeping such distress, be sooner made. In *R.* v. *Williams* (*a*) it was held that this provision applied to warrants upon orders for non-payment of church rate under 53 Geo. 3, c. 127, that they were not exempted from the operation of the Act by the 3rd section, which applied only to distresses for non-payment of tithes and church rates by *Quakers* under 7 & 8 Will. 3, c. 34, and 1 Geo. 1,

(*a*) 14 Jur. 115; 2 Car. & Kir. 1001; 19 L. J. M. C. 126.

c. 6, and that such a warrant directing the goods to be sold *forthwith*, as in the form given in Burn's Justice was consequently bad.

The form given by the 11 & 12 Vict. c. 43 (*b*), seems in like manner to contemplate certain days being named in the warrant as a limit within which the goods are not to be sold, but to leave the number in the discretion of the justice granting the warrant.

It will be observed, that if any person find himself aggrieved at the judgment of the justices, an appeal is given to the next general quarter sessions, and no distress warrant is to be granted until the appeal has been determined (*c*).

The appeal is directed to be to the *next general quarter sessions*, but this does not mean strictly the next sessions, for they might happen the very next day after the hearing before the justices. The words must be construed to mean the *next practicable sessions;* allowing the party a reasonable time to judge of the propriety of appealing, to prepare

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(*b*) See schedule (No. 2).

(*c*) In *White and Jackson* v. *Beard*, 2 Curt. 186, Sir *S. Lushington* is reported to have said, with reference to this power of appeal, "I confess, when I look at the clause altogether, I have great difficulty to understand upon what ground there would be an appeal at all;" but see *R.* v. *Staffordshire JJ.*, 4 A. & E. 842, *post*, pp. 232, 233; *R.* v. *St. Clement's*, 12 A. & E. 177; S. C. nom. *R.* v. *Ipswich JJ.*, 3 P. & D 481, *ante*, pp. 217, 221. That the party proceeded against would not be allowed at the sessions to insist upon the invalidity of the rate, or his non-liability to pay it, if these objections were not taken before the justices below, appears to be tolerably clear; *R.* v. *Jeffreys*, 1 B. & C. 604. That he cannot do so in an action of replevin upon a distress for non-repayment of a church-rate under an order of justices has been expressly decided; *Ramsbottom* v. *Duckworth*, 1 Exch. 506; and that the sessions have no jurisdiction to *inquire* into these matters is clear. See *R.* v. *Staffordshire JJ.*, ex parte *The Churchwardens of Abbotts Bromley*, 27 L. T. 284.

his case, get up his evidence, give notice of appeal, &c. (*a*); but the appeal must be entered at, and notice of appeal be duly given for, such first practicable sessions, or the justices will not have jurisdiction to entertain it (*b*), though they may in such case, at their own discretion, adjourn the hearing to a subsequent sessions (*b*).

The statute is silent as to the time when notice of appeal must be given. This was formerly regulated by the practice of the particular sessions; but by a recent Act to amend the procedure in courts of general and quarter sessions of the peace in England and Wales, and for the better advancement of justice in cases within the jurisdiction of those courts, it is provided that fourteen clear days' notice of appeal at least shall be given, and by the same section it is enacted that such notice of appeal shall be in writing signed by the person or persons giving the same, or by his, her, or their attorney, on his, her, or their behalf, and the grounds of appeal shall be specified in every such notice, with a proviso that it shall not be lawful for the appellant or appellants to go into or give evidence of any other ground of appeal besides those set forth in such notice (*c*).

The statute is also silent as to the parties to whom notice of appeal is to be given. It will therefore be sufficient, if the notice be given to the parties really interested, that is, to the churchwardens, &c., and it is not necessary to give notice to the justices; nor can the sessions insist upon any

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(*a*) See *R.* v. *Flintshire JJ.*, 7 T. R. 200; *R.* v. *Sussex JJ.*, 15 East, 206; *R.* v. *Essex JJ.*, 1 B. & A. 210; *The Liverpool United Gas Company*, apps., and *The Union Assessment Committee of the Union of West Derby*, resps., 6 C. P. (L. R.) 414; see also Archbold's "Sessions Practice," p. 566, *et seq.*

(*b*) *R.* v. *West Riding JJ.*, 4 M. & S. 327.

(*c*) See 12 and 13 Vict. c. 45, s. 1, and see this statute generally for the proceedings at the sessions.

such notice being given, for they have no power to introduce a new condition of appeal which is not in the Act of parliament (*d*).

It should, moreover, be observed, that it is provided by a recent statute, "that after the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way by any law now in force, or hereafter to be made, either party to the proceeding before the said justice or justices may, if dissatisfied with the said determination, as being erroneous in point of law, apply in writing within three days after the same to the said justice or justices to state and sign a case, setting forth the facts and the grounds of such determination, for the opinion thereon of one of the superior courts of law at Westminster, to be named by the party applying" (*e*) which the justices are bound to do, unless they are of opinion that the application is merely frivolous (*f*); and if they refuse on this ground *improperly*, the Court of *Queen's Bench* will rule them to state the case (*g*).

It has been decided that this statute gives a right of appeal as well against the dismissal of the complaint as against the conviction (*h*).

But it must be borne in mind that the justices are not authorized by this statute to state a case for the opinion of the Court on the validity of the rate, or the liability of the party to pay it, where either of these facts is disputed, for these are matters which they have no power to determine in a summary way (*i*).

(*d*) *R.* v. *Staffordshire JJ.*, 4 A. & E. 842.
(*e*) 20 & 21 Vict. c. 43, s. 2.
(*f*) Sect. 4.
(*g*) Sect. 5.
(*h*) *Davys*, app., v. *Douglas*, resp., 28 L. J. M. C. 193.
(*i*) *Backhouse* v. *The Churchwardens of Bishopwearmouth*, 9 C B. (N.S.), 315; and see ex parte *May*, 2 B. & S. 425, 31

It is clear that, notwithstanding the statute 53 Geo. 3, 127, the *Ecclesiastical Courts* have jurisdiction over church rates not exceeding 10*l.*, in all cases where the validity of the rate, or the liability of the party charged, is disputed (*a*), but when this is not the case, it has been much doubted whether they retain their jurisdiction. In *Ricketts* v. *Bodenham* (*a*), the Court of *King's Bench* expressed an opinion that they do not, but they afterwards seemed to entertain doubts on this subject in *R.* v. *Thorogood* (*b*); as also, apparently did *Cottenham*, Lord Chancellor, in the subsequent case of *R.* v. *Baines* (*c*). It has, however, been recently decided in the Court of *Queen's Bench* that the jurisdiction of the Court *Christian* is taken away in such case (*d*). The Court of *Christian* has indeed *original* jurisdiction in all cases of church rate not exceeding 10*l.*, and retains that jurisdiction, unless and until it appear by the pleadings, that neither the validity of the rate, nor the liability of the defendant, is disputed (*e*); but if the defendant appear and plead either of these facts, the jurisdiction of the Court *Christian* is at an end, unless the plaintiff has previously resorted to the summary jurisdiction of the magistrates (*f*). In all cases, therefore, in which the magis-

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L. J. M. C. 161, and *Wilson and others*, apps., v. *The Churchwardens of the parish of Sunderland-near-the-Sea*, resps., 30 L. J. M. C. 90.

(*a*) 4 A. & E. 433.

(*b*) 12 A. & E. 183; 3 P. & D. 629. S. C.

(*c*) 1 Cr. & Phil. 42.

(*d*) *Richards* v. *Dyke*, 3 Q. B. 256; 2 G. & D. 493, S. C.

(*e*) *Ricketts* v. *Bodenham*, 4 A. & E. 433; *R.* v. *Thorogood*, 12 A. & E. 184; 3 P. & D. 629, S. C.; *R.* v. *Baines*, 1 Cr. & Phil. 42.

(*f*) *White and Jackson* v. *Beard*, 2 Curt. 488; *Richards* v. *Dyke*, 3 Q. B. 256; 2 G. & D. 493, S. C. In *Richards* v. *Dyke*, the Court of *Queen's Bench*, did not indeed expressly decide this point, but the tenor of their observations is clearly in accordance with the view expressed by Dr. *Lushington* in *White and Jackson* v.

trates have jurisdiction, proceedings should, in the first instance, be taken under this statute.

Several Acts have been passed by the legislature, for the purpose of furnishing an easy and summary method for the recovery of church rates and other ecclesiastical dues from Quakers. They are intended for the benefit of the Quakers themselves, and to prevent their being liable to expensive suits, for refusing to pay these dues upon scruples of conscience, by giving an apparent compulsory method of levying them in a summary way (*g*).

By 7 & 8 Will. 3, c. 34, s. 4, after reciting, that "by reason of a pretended scruple of conscience, Quakers do refuse to pay church rates" (*h*), it is enacted, that when any Quaker shall refuse to pay any church rates, it shall be lawful for the two *next* justices of the peace of the same county, upon the complaint of any churchwarden or churchwardens, who ought to have, receive, or collect the same, by warrant under their hands and seals, to convene before

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Beard. The words are: "We are not called upon in this, any more than in the former cases already referred to, to determine whether it be necessary, in order to give jurisdiction to the *Ecclesiastical Court*, that the fact of a dispute existing respecting the validity of the rate or the liability of the party should appear upon the face of the libel; that court has general jurisdiction in matters regarding church rates, and perhaps this is rather a question of practice or pleading in that court."

(*g*) Per Cur. in *R.* v. *Rogers, Wakefield and others*, H. T. 51, Geo. 2; Burn's Justice, by Chitty and Hulme, vol. vi. p. 48, tit. "Tithes;" by D & W. vol. v. 1116; and see this case nom.; *R.* v. *Wakefield, et al.*, 1 Burr. 485; where similar language is attributed to the Court.

(*h*) This statute applies also to tithes. The section is not, nor is the 6th section of 53, Geo. 3, c. 127, hereafter referred to, dealt with by the statute law revision Acts; but, so far as regards church rates, they are, of course, impliedly repealed by the "Compulsory Church Rate Abolition Act, 1868" (31 & 32 Vict. c. 109), except as to any rate the payment of which may still be enforced by process of law.

them such Quaker, and to examine upon oath the truth or justice of the said complaint, and to ascertain and state what is due and payable by such Quaker, and, by order under their hands and seals, to direct payment thereof, so as the sum ordered do not exceed 10*l.*; and upon refusal of such Quaker to pay according to such order, it shall be lawful for anyone of the said justices by warrant under his hand and seal, to levy the money by distress and sale of the goods of such offender, paying him the overplus after deducting the necessary expenses, with a power of appeal to the next general quarter sessions, and a proviso that no distress warrant shall be granted pending the appeal, as in 53 Geo. 3, c. 127, s. 7.

By 1 Geo. 1, c. 6, s. 2 (*a*), any to or more justices may grant the original summons, hear the complaint, and make the order for payment, with such costs and charges as they shall think reasonable, not exceeding 10*s.*; and by 53 Geo. 3, c. 127, s. 6, it is enacted, that *one* justice of the peace shall be competent to receive the original complaint, and summon the party to appear before the two or more justices.

By 53 Geo. 3, c. 127, s. 6 (*b*), these enactments are extended to all cases where the amount claimed does not exceed 50*l.* (*c*).

(*a*) The provisions in this Act and in 7 & 8 Will. 3, c. 34, ss. 3, 4, as to the necessity of the acting justices not being patrons of the church or interested in the tithes seem to be confined in their operation to *tithes*, &c., and not to apply to the case of *church rates*.

(*b*) See p. 235, n. (*h*).

(*c*) By 5 & 6 Will. 4, c. 74, explained and amended by 4 & 5 Vict. c. 36, it is (amongst other things) enacted, that no suit or proceeding shall be had or instituted in any of Her Majesty's courts in England, or in any *Ecclesiastical Courts* in England, for any great or small tithes, moduses, compositions, rates or other ecclesiastical dues or demands whatsoever, or under the

In some previous editions of this work the author, relying on the fact that the justices are to examine the *truth and justice of the said complaint*, and that there are no provisions in these enactments to prevent their jurisdiction from attaching in the event of the validity of the rate having been disputed in any *Ecclesiastical Court*, or to oust their jurisdiction in the event of notice being given by the party charged of an intention *bonâ fide* to dispute the validity of the rate or his liability to pay it, as under 53 Geo. 3, c. 127, s. 7, ventured to express an opinion that the justices have for all purposes, as well of *law* as of *fact*, complete jurisdiction in these cases; and he was confirmed in this opinion by the case of *Richardson*, appellant, v. *Gladwin and Gooday*, respondents (*d*), where the justices made the order against a Quaker, although the validity of the rate was disputed, and the *Queen's Bench*, on a case stated by them under 20 & 21 Vict. c. 43, on other points, affirmed the order of the justices :—the jurisdiction of the

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value of 50*l.*, withheld by any Quaker; but that all complaints touching the same shall be heard and determined only under the powers and provisions of 7 & 8 Will. 3, c. 34, and 53 Geo. 3, c. 127. It is apprehended, from the consideration of the avowed objects of these Acts—"the more easy recovery of *tithes*,"—and from the omission of all mention of church rates in the recital of several Acts of parliament, applicable, in express terms, to church rates as well as tithes, that these Acts were not intended to apply, and do not apply, to cases of church rates; though possibly the words "*rates or other ecclesiastical dues or demands whatsoever*," may be thought to justify a different opinion, which appears indeed very extensively to have prevailed. See Burn's Ecclesiastical Law, by Phillimore, tit. "Church rates;" Burn's Justice, by Doyley and Williams; and also the recent edition of the same work, by Bere and Chitty, tit. "Churchwardens." That the statute does not apply to the case of a rate for church purposes made under the authority of a local Act, see *Wilson and others*, apps., v. *The Churchwardens of the parish of Sunderland-near-the-Sea*, resps., 34 L. J. M. C. 90.

(*d*) 1 E. & E. 138.

justices was not questioned although the sum sought to be recovered was under 10*l.*

But in the recent case of *Backhouse*, appellant, and *The Churchwardens of Bishopwearmouth*, respondents (*a*), the Court of *Common Pleas* held that the jurisdiction of the justices was ousted when the validity of the rate was *bonâ fide* disputed, on the ground that there was nothing in these statutes to exclude the operation of the general rule that the summary jurisdiction of justices ceases when a matter of title comes into question *bonâ fide* before them; and in the subsequent case of *Pease and others* v. *Chaytor and another* (*b*), the Court of *Queen's Bench* expressed themselves bound by *Backhouse* v. *The Churchwardens of Bishopwearmouth*, as the decision of a court of co-ordinate jurisdiction, and seemed to think, moreover, that the proviso in the 7th section of 53 Geo. 3, c. 127, applied to proceedings against Quakers.

It should, however, be mentioned here, that on the Court of *Common Pleas* holding in *Backhouse* v. *The Churchwardens of Bishopwearmouth* that the jurisdiction of the justices was ousted by the disputing of the rate by the Quaker, the churchwardens of Bishopwearmouth commenced a suit in the *Ecclesiastical Court* against him for subtraction of the rate. The Quaker thereupon in due course applied to the Court of *Exchequer* for a rule for a prohibition to restrain the Court *Christian* from proceeding with the suit, on the ground that they had no jurisdiction to entertain it, and for the purpose of having the decision of the Court of *Common Pleas* reviewed, if necessary, by a court of error. The Court of *Exchequer* thought the question deserving of further consideration, and gave the Quaker leave to declare in prohibition; but no further

(*a*) 9 C. B. (N. S.) 315. (*b*) 3 B. & S. 62.

proceedings were taken in the matter, as the suit in the Court *Christian* was shortly afterwards arranged by the parties (*c*).

The judgment of the justices and of the Court of Quarter Sessions is final, and the proceedings cannot be removed into any other court by *certiorari* or otherwise (*d*).

But the fact that the *certiorari* has been taken away will not preclude justices from granting a case for the opinion of one of the superior courts of common law at *Westminster*, under 20 & 21 Vict. c. 43.

The provisions of 54 Geo. 3, c. 170, s. 12, and those of 57 Geo. 3, c. 93, s. 1, are of course applicable to these cases, as well as to those under 53 Geo. 3, c. 127, s. 7.

It can scarcely be necessary to add that the proceedings will now in great measure be regulated, as in the former case, by the provisions of 11 & 12 Vict. c. 43.

(*c*) The author is not aware of any report of these proceedings, but the particulars were kindly furnished him by Mr. *Alfred Wills*, Q. C. of the Midland Circuit, the counsel for Mr. *Backhouse* in the Court of *Exchequer*.

(*d*) It seems to be clear from 7 & 8 Will. 3, c. 34, s. 4, and 1 Geo. 1, c. 6, s. 2, that the right of removal by *certiorari*, &c., is taken away in the case of *church rates*. By the former statute, which applies to tithes not exceeding 10*l.* as well as *church rates*, the right of removal is expressly confined to questions of tithes: the words are "*and no proceedings or judgment had or to be had by virtue of this Act shall be removed or superseded by any writ of* certiorari, *or other writ, out of Her Majesty's courts at Westminster, or any other court whatsoever, unless the title to such tithes shall be in question.*" By the latter statute the remedy under 7 & 8 Will. 3, c. 34, s. 4 (originally of limited duration), is made perpetual, and the like remedy given "*against any Quaker or Quakers for the recovery of any tithes or rates or any* CUSTOMARY OR OTHER RIGHTS, DUES OR PAYMENTS *belonging to any church or chapel, which of right, by law and custom, ought to be paid for the stipend or maintenance of any minister or curate, and the proceedings shall not be removed into any other court unless the title to such tithes,* DUES, OR PAYMENTS, *shall be in question, in like manner as in and by the same Act is limited and directed.*"

The various provisions for the recovery of church rates before justices of the peace are applicable to rates under the Church Building Acts and the 5 Geo. 4, c. 36, as well as to ordinary common law rates (*a*).

It may be observed here, that if the party upon whom an order of justices for payment of a church rate has been duly made refuses to obey it after due service and demand of payment, he will be liable to an indictment for disobeying an order of justices (*b*).

It should further be stated that by the 12th section of the said statute (53 Geo. 3, c. 127) it is enacted, that if any action or suit shall be brought or commenced for anything done in pursuance of that Act, every such action or suit shall be commenced within three calendar months next after the fact committed and not afterwards, and shall be laid and tried in the city or county wherein the cause of action shall have arisen, and not elsewhere, and that the defendant or defendants may plead the general issue and give that Act and the special matter in evidence, and that the same was done in pursuance or by the authority of the Act.

It has been held that an action for seizing and selling the plaintiff's goods is commenced within three calendar months *after the fact committed* within the meaning of this statute, if brought within three calendar months after the sale, though not within that time after the original seizure (*c*).

It should also be borne in mind that if the justices make the order for payment of the rate without jurisdiction, and the churchwardens proceed to enforce it by distress warrant,

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(*a*) See *R.* v. *Staffordshire JJ.*, ex parte *The Churchwardens of Abbotts Bromley*, 27 L. T. 284; In re *Batkin and Staffordshire JJ.*, 25 L J. M. C. 126.

(*b*) *R.* v. *Bidwell*, 1 Den. C. C. 223; 17 L. J. M. C. 99.

(*c*) *Collins* v. *Rose*, 5 M. & W. 194; and see *Pease and others* v. *Chaytor and another*, 3 B. & S. 620.

they will be liable to an action (*d*); but if the justices wrongly determine on the evidence before them that the complaint was made within six months from the demand of the rate (*e*), or that the objections to the validity of the rate or the liability of the party to pay were not *bonâ fide* (*f*), and in consequence make the order, they will nevertheless be exempt from all liability, unless it be alleged and proved against them that they acted maliciously and without reasonable and probable cause (*g*); if, however, they knew when they made the order that the objections were *bonâ fide*, the action may be maintained without any such allegation or proof (*h*).

Before concluding this section, it may also be well to direct attention to the case of *Skingley* v. *Surrige* (*i*) in the Court of *Exchequer*. In that case it was held that the goods of a churchwarden might be seized under a distress for non-payment of a poor rate upon the complaint of the other churchwarden and the overseers, on the ground that *all* the churchwardens and overseers need not join in an application to a justice to enforce payment of a poor rate

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(*d*) *Dale* v. *Pollard*, 10 Q. B. 504; *Pease and others* v. *Chaytor and another*, 3 B. & S. 620.

(*e*) *Somerville* v. *Mirehouse and another*, 1 B. & S. 652.

(*f*) *Pease and others* v. *Chaytor and another*, 3 B. & S. 620; Per *Wightman and Blackburn*, JJ., *dissentiente Mellor*, J.

(*g*) See 11 & 12 Vict. c. 44, s. 1.

(*h*) *Pease and others* v. *Chaytor and another*, 1 B. & S. 658. It was further held in *Pease* v. *Chaytor* that a judgment in replevin against the churchwardens is an answer to an action of trespass against the justices in respect of the same seizure. See 1 B. & S. 658; 3 B. & S. 620; and *quære* whether the costs of quashing the order are special damages, recoverable at all against the justices. See 3 B. & S. 624. As to the necessity for quashing the order before suing the justices for acting without or in excess of jurisdiction, see 11 & 12 Vict. c. 44, s. 2; and as to the time within which an action must be brought against justices for anything done in the execution of their office, see sect. 3.

(*i*) 11 M. & W. 505.

by a warrant of distress, as the statute (*a*) authorizes the obtaining of the warrant by the churchwardens and overseers, *or any of them*. In like manner, as the 53 Geo. 3, c. 127, s. 7, authorizes the order to be obtained upon the complaint of *any* churchwarden or churchwardens, chapelwarden or chapelwardens, it would probably be held that a churchwarden may proceed under this statute against his co-churchwarden, and there can be little doubt that in those cases where churchwardens by custom act severally for separate districts, they may lawfully proceed against each other in respect of assessments upon property within their respective districts (*b*).

SECTION III.

On Suits in Ecclesiastical Courts for the Subtraction of Church Rates, and the ordinary Grounds of resisting Payment.

In all cases, except those already mentioned in which a summary jurisdiction is given by statute to justices of the peace, the proceedings must still be in the *Ecclesiastical Courts*, by suit for subtraction of church rate (*c*).

They must be commenced in the Court of the Ordinary, that is, in usual cases, in the *Consistory Court* of the diocese in which the church is situated in respect of which the rates are due; but an appeal lies from that Court to the Court of Appeal of the province to which the diocese belongs, with an ultimate appeal to the Queen in Council,

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(*a*) 4 Eliz. c. 43, s. 34.

(*b*) See *R.* v. *Fenton and others*, 1 Q. B. 480; 1 G. & D. 17, S. C. *ante*, p. 217, and see *post*, p. 246.

(*c*) Gibs. Cod. lib. ix. c. 4, *Anon.*, Frem. by Smirke, 289. See form of citation into the *Ecclesiastical Court* for subtraction of church rates, *R.* v. *Thorogood*, 12 A. & E. 183 (n.)

to be referred by her to her Judicial Committee of the Privy Council (*d*).

The case may also, if desired, be heard at once in the *Archiepiscopal Court*, by means of *letters of request* from the inferior court (*e*).

It should be added that since the passing of the "Compulsory Church Rate Abolition Act, 1868," the Dean of Arches has required that the letters of request in a suit for subtraction of church rate shall state the date on which the rate was made, and the circumstances taking the rate out of that Act; and that the acceptance of the letters of request shall in every case be moved by counsel (*f*).

If in the progress of the suit the *Ecclesiastical Court* proceed to a manifest excess of jurisdiction, as to try a custom or prescription, to ascertain the boundaries of a parish, to refuse such evidence in proof of a collateral

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(*d*) 24 Hen. 8, c. 12; 25 Hen. 8, c. 19; 2 & 3 Will. 4, c. 92; 3 & 4 Will. 4, c. 41; 34 & 35 Vict. c. 91. As to the power of Her Majesty by order in Council to direct that the jurisdiction of the Judicial Committee shall be transferred to Her Majesty's High Court of Appeal under the "Supreme Court of Judicature Act, 1873" (36 & 37 Vict. c. 66), see sect. 21 of that Act. This Act comes into operation on the 1st November, 1875, see the "Supreme Court of Judicature (Commencement) Act, 1874," 37 & 38 Vict. c. 83.

(*e*) *Hawes and Vicatt* v. *Pellatt*, 2 Curt. 473; 12 A. & E. 208 (n.) Ex parte *Williams*, 3 B. & C. 313; *Jolly* v. *Baines*, 12 A. & E. 201; 23 Hen. 8, c. 9, s. 3; Ecc. Law Rep. 11. It seems, however, that where there is an intermediate court of appeal, letters of request will not be accepted *per saltum*, so as to pass over the intermediate court, although the judge of such intermediate court, join in the letters of request. See *Steward* v. *Bateman*, 3 Curt. 209. That the Archiepiscopal Court has no original jurisdiction, and cannot enquire concerning any other assessment than that mentioned in the letters of request, see *Asterley and others* v. *Adams*, 3 Ad. & Ecc. (L. R.) 361.

(*f*) See *Rippin and Wilson* v. *Bastin*, 20 L. T. (N.S.) 625; 38 L. J. Notes of cases, 48.

question not properly of spiritual cognizance as would be deemed sufficient at common law, or to misinterpret the common law, or to misconstrue a statue, a *prohibition* may be obtained (*a*).

The proceedings ought to be commenced forthwith, and the *Ecclesiastical Courts* have severely censured any unnecessary delay in the prosecution of suits for subtraction of church rates (*b*).

In *Baker and Downing* v. *Wood* (*c*), which was a suit for subtraction of church rate brought before the *Arches Court* by letters of request from an inferior court, Sir *Herbert Jenner Fust*, censuring the delay in the case, observed: "I

(*a*) See the various grounds for a prohibition in the judgment of the Court of *Queen's Bench*, in *Burder* v. *Veley and another*, 12 A. & E. 233; 4 P. & D. 452, S. C.; and of the *Exchequer Chamber*, in *Veley and another* v. *Burder*, in error, *ib.*; and see Burn's Ecc. Law, tit. "Prohibition."

(*b*) See *Thompson and another* v. *Cooper*, 3 Phill. 640; *Baker and Downing* v. *Wood*, 1 Curt. 507. In the case of *Blount* v. *Fife*, Arches Court, E. T., 1865, MS., where the rates were made in 1838, 1839, 1840, and 1841, and no proceedings were taken until March, 1843, nor any reason assigned for not proceeding before, Sir *Herbert Jenner Fust* severely censured the delay, and only allowed the churchwardens a moiety of their costs in consequence. Unnecessary delay is almost equally censurable in the *making* of the rate; but the churchwardens are of course entitled, without blame, to a reasonable time for enabling them to survey the church and procure the necessary estimates. In the case, *Ellis and Gough* v. *Griffin*, 2 Curt. 673; 1 N. E. C. 4, S. C., it appeared that the churchwardens had been appointed in the month of April, and the vestry, at which the rate was made, held in the October following. It was urged that the churchwardens had been guilty of *laches* in not calling a vestry before; but Sir *Herbert Jenner Fust* said: "I cannot assume that there was any degree of *laches* on the part of the churchwardens in the execution of their duty; for it is impossible to say that they must not have time to look about them, to consider what repairs or expenses are necessary, and to be prepared with estimates to lay before the vestry."

(*c*) Curt. 507.

should be inclined in future, in cases of church rate, not to accept letters of request where the parties have not used due diligence to bring the question to a speedy adjudication, as through such delay it may happen that many persons may be called upon to pay a rate which may ultimately turn out to be illegal."

Delay does not, however, in itself, present any *legal* obstacle to the right to recover the rate: for even rates assessed in previous years may be legally sued for and recovered (*d*).

But it seems that the suit must be prosecuted in the lifetime of the party assessed, on the ground that the obligation to repair the church is an obligation *in personam*, which expires with the person, and for which his executor is not liable (*e*).

It is conceived also that a church rate is a debt within the bankrupt laws, and that the party assessed would be protected from personal liability by a subsequent bankruptcy and discharge under the bankruptcy law (*f*).

(*d*) See *R.* v. *Inhabitants of St. Clement's*, 12 A. & E. 177. S. C. nom. *R.* v. *Ipswich JJ.*, 3 P. & D. 481; *Still and Bunn* v. *Palfrey*, 2 Curt. 902; 1 N. E. C. 220, S. C.; *Blount and another* v. *Fife*, supra p. 244, note (*b*.) The late Vice-Chancellor of England is, indeed, reported to have expressed a different opinion, in *Marriott* v. *Tarpley*, 9 Sim. 279, apparently from a misapprehension that this had been so decided in *Ricketts* v. *Bodenham*, 4 A & E. 433; see also *Hadman and Green* v. *Ringwood*, Cro. Eliz. 14.

(*e*) *Williams* v. *George and Nunn*, 3 Curt. 343; 2 N. E. C. 85, S. C. In that case Sir *Herbert Jenner Fust* said, that if the suit had been commenced in the lifetime of the party rated, and he had subsequently died, the suit would have immediately abated, and his executors would not have been called upon to pay the rate.

(*f*) See *Lloyd* v. *Heathcote*, 2 Bro. & B. 388. See also In re *Wetherall and Courthorpe*, 19 L. J. (M. C.) 115. The Bankruptcy Act now in force is the "Bankruptcy Act, 1869" (32 & 33 Vict. c. 71).

The churchwardens must prosecute the suit *jointly* (*a*), except perhaps in cases where, by custom, one churchwarden acts for a particular district (*b*).

Nor can a churchwarden use the name of his co-churchwarden without his consent, even when the co-churchwarden has signed letters of request, for a man does not become a party to the suit by signing letters of request (*c*).

If the party, upon being duly cited in the *Ecclesiastical Court*, neglect or refuse to appear, he may be declared contumacious, and upon *significavit* of his contumacy to the Queen in Chancery, taken under a writ *de contumace capiendo* (*d*); or the Court may proceed with the case in

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(*a*) Prid. 131, and so ruled by Dr. *Lushington* in *Fry and Greta* v. *Treasure*, 10 Jur. (N.S.) 1113, affirmed on appeal. 2 Moore, P. C. (N.S.) 539; 11 Jur. (N.S.) 205. In *Ewens and Spear* v. *Latimer*, 26 "Ecclesiastical Gazette," 317, the Chancellor of *Exeter* dismissed the suit with costs, because it was brought by two only out of four churchwardens.

(*b*) *Astle* v. *Thomas*, 2 B. & C. 271; 3 D. & R. 492; *R.* v. *Fenton and others*, 1 Q. B. 480; 1 G. & D. 17, S. C., and see *Bremner and others* v. *Hall*, 35 L. J. C. P. 332; 1 C. P. (L. R.) 748. And *quære* whether any churchwarden or overseer of the parish or district may not sue for rates made under 5 Geo. 4, c. 36, by virtue of the language of the second section of that Act. See the section *ante*, p. 209. It may, however, be laid down, as a general rule, that churchwardens must act jointly whenever the act *quâ* churchwardens (*post*, c. 4, s. 4), and see the observations of Sir *R. Phillimore* in *Ritchings* v. *Cordingley*, 3 A. & E. (L. R.) 113, except only in making presentments, which they may do severally, though the usual practice is to make them jointly (see Prid. 132), even in cases where by custom they act severally for separate districts. See *R.* v. *Marsh*, 5 A. & E. 468; 6 N. & P. 668, S. C., and in those cases in which they are authorized to act separately by statute, as, for a further example, by "The Public Worship Regulation Act, 1874" (37 & 38 Vict. c. 85). See this Act in the Appendix, p. xl.

(*c*) *Fry and Greta* v. *Treasure*, supra, p. 245, note (*d*).

(*d*) 53 Geo. 3, c. 127; 2 & 3 Will. 4, c. 93, *R.* v. *Thorogood*, 12 A. & E. 183; 3 P. & D. 629, S. C.

his absence, and make a final decree against him for payment of the sum subtracted and costs of suit (*e*).

The citation must be served on the defendant in person, and in the latter case it must expressly state, that if he do not appear, the Court will proceed with the hearing in his absence. As he must, therefore, be furnished with due notice of the intention of the Court to proceed against him, he can have no real ground of complaint at their doing so, in the event of his contumaciously refusing to appear (*f*).

In *R.* v. *Baines* (*g*), the validity of this latter course was called in question upon a writ of *habeas corpus* in the Court of *Queen's Bench*. Lord *Denman*, C. J., in delivering the judgment of the Court on this head, said: –

"The second objection was that the act of the Court was in itself repugnant to the first principles of justice, as the defendant had never appeared, and was condemned to pay the rate and costs, though he had only been brought into contempt for that reason, and not heard in his own defence. But we cannot say that this is necessarily wrong. A Court must, in some cases, proceed against those who do not choose to appear, when duly served with notice, even to the extent of adjudging them to do the very thing which, if they had appeared, they might have shown a justification for leaving undone. A plaintiff may enter an appearance for the defendant in our Courts. A defendant in a Chancery suit, who is in contempt for failing to answer, is taken to confess the charges in the bill. Both these are statutory provisions; but they sufficiently prove that such condemnation of the

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(*e*) *R.* v. *Baines*, 12 A. & E. 210; 4 P. & D. 362, S. C.
(*f*) See Eccl. Law Rep. 14, 15, 16.
(*g*) 12 A. & E. 210; 4 P. & D. 362, S. C.

voluntarily absent is not a violation of natural justice. And the practice of the *Ecclesiastical Courts* may give all just and reasonable protection to defendants."

The usual grounds upon which payment of a church rate is disputed in the *Ecclesiastical Courts* may be arranged under the following heads:—

First. That the rate was illegally made.

Secondly. That the rate was made for an illegal purpose.

Thirdly. That the rate is unnecessary.

Fourthly. That the defendant is unfairly assessed.

Fifthly. That the defendant is assessed in respect of property for which he is not liable.

As to the first objection, viz., *that the rate was illegally made.*

The general rule is, that the rate must be made by the parishioners in vestry assembled; otherwise the making is illegal, and the rate cannot be sustained (*a*).

And, therefore, when some of the bishops, during the violent opposition of the Puritans to the Church in the time of King Charles II., were induced to grant a commission for the purpose of making church rates, and rates were assessed under this commission without the consent of the vestry, the commission was held to be illegal and the rates void (*b*).

So where the churchwardens themselves make a rate without calling a vestry (*c*), or where they make a rate for the necessary repairs of the church, even after a vestry

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(*a*) *Ante*, p. 97, Gibs. Cod. 220; *Pense* v. *Prowse* (otherwise *Hawkins* v. *Rouse*), 1 Lord Raym. 59; 1 Salk. 165; Hold. 139; Car. 360; Comb. 344; 12 Mod. 83; *Cockburn* v. *Harvey*, 2 B. & Ad. 797.

(*b*) *Rogers* v. *Davenant*, 1 Mod. 194; Freem. 286, S. C.

(*c*) *Pierce* v. *Prowse*, 1 Salk. 165; S. C. nom.; *Pense* v. *Prowse*, 1 Lord Raym. 59.

duly convened have contumaciously and obstinately refused to grant the rate (*d*), the proceedings are illegal, and payment of the rate may be successfully resisted, for the churchwardens have at common law no power to impose a tax upon the parishioners (*e*).

In like manner the rate will be bad, although made for necessary repairs only, if it be made by a minority of those present in vestry without the concurrence of the majority, even though the majority may have contumaciously and obstinately refused to grant a rate (*e*).

And where the rate was imposed by a select vestry not authorized to make church rates, instead of being made by the ratepayers in vestry assembled, it was held to be bad (*f*).

Upon the same principle, if any of the conditions requisite to give validity to the proceedings of the vestry have been omitted, their vote is a nullity, and the rate cannot be enforced.

As for example, if the churchwardens had neglected duly to affix at or near the principal doors of all the churches and chapels of their parish the necessary notice for convening of the vestry (*g*).

Or, if the notice did not state with sufficient certainty the special purpose for which the meeting was convened (*h*).

(*d*) *Burder* v. *Veley and another*, 12 A. & E. 233; 4 P. & D. 452, S. C.; *Veley and another* v. *Burder*, in error, 12 A. & E. 265; 4 P. & D. 475.

(*e*) *Gosling* v. *Veley*, in Dom. Proc. 4 H. of L. Cas. 679; 17 Jur. 939; and see Attree's *Braintree Church Rate case*.

(*f*) *Cockburn* v. *Harvey*, 2 B. & Ad. 797.

(*g*) *Ante*, p. 99, *et seq.*; and see *R.* v. *Dalby*, 3 Q. B. 602.

(*h*) *Ante*, p. 102, *et seq.*; and see *Smith* v. *Deighton*, 8 Moore, P. C. 179.

Or if a poll be denied (*a*), or limited to the ratepayers present at the meeting (*b*), or taken by ballot (*c*) or in any other respect conducted illegally (*d*).

Or if the right be in a select vestry consisting of a definite number of vestrymen, and the rate were made at a meeting to which every member had not been duly summoned (*e*), or at which a majority of the persons constituting such select vestry were not present (*f*), or the like (*g*).

And if the rate sought to be recovered be not a rate at common law, but a rate raised under the authority of an Act of parliament, all the conditions required by the Act must have been complied with, or the rate will have been illegally made, and it must appear upon the face of the libel that these conditions have been so complied with (*h*).

Thus in suing for the recovery of a church rate assessed for raising a sum for the repayment of money borrowed on the security of church rates, for the enlarging or repairing of churches, under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, it must be shown that the requisite consent of the vestry, bishop, and incumbent had been duly obtained in the manner specified in the respective Acts, and that the required number of free seats have been duly allotted (*h*).

The judgment of Sir *John Nicholl* in *Blunt and Fuller* v. *Harwood* (*h*) furnishes a clear illustration of this principle.

(*a*) *Ante*, p. 116, *et seq.*
(*b*) *Ante*, p. 124.
(*c*) *Ante*, p. 115.
(*d*) See generally as to the requisite conditions to give validity to the proceedings of a vestry, *ante*, c. 2, s. 3.
(*e*) *Dobison* v. *Fussy*, 7 Bing. 305.
(*f*) *Blackett* v. *Blizzard and another*, 9 B. & C. 851.
(*g*) See generally as to select vestries, *ante*, c. 2, s. 3. See p. 135, *et seq.*
(*h*) *Blunt and Fuller* v. *Harwood*, 1 Curt. 649.

The question was as to the admissibility of a libel in a suit for a subtraction of church rate, promoted by the churchwardens of *Streatham* against Mr. *Benjamin Harwood*, a parishioner. The rate in question was made to repair the parish church, and to repay certain portions of a principal sum of 3,330*l.* borrowed under the *statutes* 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, and interest on part of that sum.

It was objected for the defendant that the libel could not be received, as it did not sufficiently show that the conditions of the Acts under which the rate had been levied had been complied with.

The following is the judgment of Sir *Herbert Jenner Fust* upon this point :—

" I am unwilling to throw out anything that might prejudice a particular case ; but I must say with reference to this case, that it is with the party claiming payment of the rate to show that the Court can enforce it. The libel states that the money was borrowed *under the authority and in pursuance of the Acts*, so that it is not a common law right : and before the party can ask the Court to enforce payment of the rate, he must show that the requisites of the Act have been complied with. What are these requisites ? The money is stated to have been borrowed for three objects—the enlargement, repair, and alteration of the church. Taking enlargement to include alteration, the 58 Geo. 3, c. 45, s. 59, requires the consent not only of the vestry, but of the bishop and incumbent, to the borrowing upon the credit of the rates, such sums of money as shall be necessary for defraying the expense of *enlarging or otherwise extending accommodation.* And it empowers churchwardens to make rates for the payment of the interest of such sums of money so to be borrowed and raised, and for providing a fund of not less

than the amount of the interest upon the sum advanced, for the repayment of the principle thereof, or for repaying such principal in such manner, and at such times, and in such proportions, as shall be agreed upon with the persons advancing any such money: provided always, that one-half of the additional accommodation which shall be obtained by any such expenditure shall be allotted to uninclosed or free seats. Is it not incumbent upon churchwardens to show that they have complied with those conditions? It is quite impossible, unless they put themselves in such a position, that the Court can enforce the rate.

"Again, with respect to repairs, the 58 Geo. 3, contains no provision for borrowing money for repairs; but under the 14th section of 59 Geo. 3, c. 134, churchwardens are empowered to borrow money upon the credit of the rates for defraying the expense of repairs, with the consent of the vestry, the bishop, and the incumbent; and they are empowered and required in such cases to raise by a rate a sum sufficient from time to time to pay the interest of the money so borrowed, and not less than 10 per cent. of the principal sum borrowed, out of the produce of such rates, until the whole of the money so borrowed shall have been repaid. They are required to raise a fund for the repayment of the principal sum, for this reason, that the repairs of the church lie on the present inhabitants, whereas the expense of enlargement falls likewise on future inhabitants. Unless the churchwardens bring themselves within these provisions, they are not able to sue for the rate, and I cannot see how the Court could enforce payment of this demand unless it be satisfied by legal proof that the money was borrowed in compliance with the conditions of these two sections of the Acts of parliament.

"The churchwardens have the power of proving the

affirmative if it can be proved ; whereas the other party is to prove a negative, that the churchwardens had not obtained the consent of the bishop and the incumbent, and that they have not allotted the required number of free seats. How is the party who has not access to the books to prove a negative? And it is not for the churchwardens to show that they have complied with the Acts of parliament.

"I am of opinion the libel must be reformed" (*a*).

But where the requisite consents had been duly given, but the original resolution of the vestry authorized the churchwardens to borrow the money *with the assistance of a committee*, and the money was in fact borrowed upon a subsequent resolution of the vestry, without any further consent of the incumbent or bishop, and it did not appear that it had been so borrowed with the assistance of the committee, but interest had nevertheless been paid on it for several years, the Court of *Queen's Bench*, without deciding whether the assistance of the committee was essential to the validity of the proceedings, held, that under the circumstances it would be reasonable to assume that such

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(*a*) And see *R.* v. *Willim and Cross, Chapelwardens of Bilston*, 16 Q. B. 1, where, on a *mandamus* to enforce the payment of money alleged to have been advanced on the security of church rates under 58 Geo. 3, c. 45, s. 59, for enlarging the chancel of Bilston, judgment was given for the defendants on two grounds : *first*, because Bilston was not a *parish*, to which alone the enactment applied ; and *secondly*, because the resolutions of the vestry did not contain any sufficient consent to the borrowing of the money on the security of the rates within the meaning of that section ; and *White* v. *Steele and another*, 12 C. B. (N.S.) 382, where prohibition went to restrain the Court *Christian* from proceeding with a suit to enforce a rate made for the repayment of money borrowed under 59 Geo. 3, c. 136, s. 25, and 3 Geo. 4, c. 72, s. 26, for the purchase of ground as an addition to the churchyard, because a poll on the resolution to purchase the ground had been demanded and refused at the vestry which passed the resolution.

assistance had been given, and granted a peremptory *mandamus* to enforce the levying of the money (*a*).

It may be well to refer here to the case of *R.* v. *Abney and another, Justices of Leicestershire* (*b*), by which it is decided that a single rate, made partly under the Church Building Acts and partly at common law, cannot be sustained. In that case a single rate had been made (as at common law) for providing additional burial ground in the parish, and for draining and spouting a chapel in the parish. It was held that the rate was bad. Lord *Campbell*, C. J., after declining to give any opinion as to whether a rate for providing additional burial ground could lawfully be made at all (*c*), proceeded as follows: "The last objection is fatal to this rate. The rate for spouting the chapel is a rate at common law. The rate for enlarging the burial ground is (at all events) justifiable only under the statutes referred to. The statutes prescribe a mode of making and

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(*a*) *R.* v. *The Churchwardens of St. Michael, Southampton*, 25 L. J. Q. B. 379; 6 E. & B. 807, S. C. That a rate may be made under 58 Geo. 3, c. 45, ss. 59, 60, although the notice required by 59 Geo. 3, c. 134, s. 25, has not been given, see *Farrell and another* v. *Smith*, 15 C. B. 572.

(*b*) 23 L. J. (M. C.) 154; 3 E. & B. 779, S. C.

(*c*) As to the enlarging of churchyards, and procuring of additional churchyards, see 43 Geo. 3, c. 108 (amended by 51 Geo. 3, c. 115); 59 Geo. 3, c. 134, ss. 22, 36, 37, 28; 3 Geo. 4, c. 72, s. 26; and 8 & 9 Vict. c. 70, s. 14. See also 15 & 16 Vict. c. 85; 16 & 17 Vict c. 134; 17 & 18 Vict. c. 87; 18 & 19 Vict. c. 128; and 20 & 21 Vict. c. 81; 30 & 31 Vict. c. 33, "The Consecration of Churchyards Act, 1867," and "The Places of Worship Sites Act, 1873" (36 & 37 Vict. c. 50). That the 2nd sect. of 51 Geo. 3, c. 115, does not authorize grants overriding any customary rights other than rights of common and manorial rights of a like nature, see *Forbes* v. *The Ecclesiastical Commissioners of England*, 15 Equity (L. R.) 51. In that case part of the waste of a manor had been granted for a burial ground; and to a bill filed on behalf of the parishioners setting up a customary right to this part of the waste as a village green, and seeking to set aside the grant, a demurrer was overruled.

laying rates under these provisions, which is different from the mode proper in a common-law rate. To lay a rate for both purposes in one and the same mode is an erroneous proceeding, and this rate is consequently bad."

Although the churchwardens have no power at *common law* to make a rate without the consent of the vestry, they may be authorized to do so by statute, and there can be no doubt that under the statutes in question they are authorized and required to make rates without the consent of the parishioners for the repayment of money previously borrowed under these Acts on the security of church rates.

"They cannot borrow money of the commissioners unless an application to them shall have been agreed to by the vestry, and not dissented from by one-third in value of the proprietors within the parish. But unless the churchwardens had authority to make a rate, the vestry and proprietors might consent to the application, and afterwards declare that they would never pay the money borrowed" (*d*).

The power of levying the rate is expressly given by the sections in question to the *churchwardens*, and not to the churchwardens and vestry, or to the parishioners in vestry assembled, and the churchwardens are bound to levy the rate in manner and at the times specified in the Acts, and although they may with propriety first submit the question to the vestry as an act of courtesy, they are not required by law to do so, and the fact of the vestry having declined to grant the rate will not justify them in refusing to make and levy it (*e*).

(*d*) Per *Tenterden*, C. J., in *R.* v. *Churchwardens of St. Mary, Lambeth*, 3 B. & Ad. 651.

(*e*) *R.* v. *Churchwardens of St. Mary, Lambeth*, 4 B. & Ad. 651. So under 5 Geo. 4, c. 36, the churchwardens and overseers of the poor are authorized and *required* to make the rates—sect. 1, *ante*, p. 209.

It has been held that the churchwardens are bound to levy the money borrowed under these statutes by *annual* rates (*a*); and this must be done, although the creditor may have agreed not to call for payment of the principal until a future time, in order to give to these statutes the beneficial effects which they were intended to have, namely, that of making the parish raise portions of the principal from year to year without any violent change in the amount of taxation (*b*).

But when the creditor has agreed not to compel payment until a future day, the churchwardens are not bound to discharge the debt from time to time as the money is levied (*b*), but may employ the fund annually raised for the liquidation of the principal for the benefit of the parish (*c*). And although it is the duty of the churchwardens to levy such annual rates, there is no obligation on the creditor to require this to be done, and he will not lose his remedy by omitting to do so (*d*).

It is, of course, very desirable that the application for a *mandamus* should be made promptly; and, if the creditor is guilty of unexplained delay in this respect, the Court of *Queen's Bench* would, according to the judgments of the judges in the case of *R.* v. *Hurstbourne Tarrant* (*e*), in the exercise of their discretion refuse the writ. But according to the judgment of the Court of *Exchequer Chamber* in the

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(*a*) *R.* v. *Churchwardens of St. Michael's, Pembroke*, 5 A. & E. 603; 1 N. & P. 69, S. C.; *R.* v. *Churchwardens of Dursley*, 5 A. & E. 10.

(*b*) *R.* v. *Churchwardens of St. Michael's Pembroke*, 5 A. & E. 603; 1 N. & P. 69.

(*c*) Per *Denman*, C. J., in *R.* v. *Churchwardens of St. Michael's Pembroke*, 1 N. & P. 69.

(*d*) *R.* v. *Churchwardens of St. Michael's, Southampton*, 25 L. J. Q. B. 370; 6 E. & B. 807, S. C. And see *R.* v. *Carpenter*, 6 A. & E. 794.

(*e*) E. B. & E. 246, 27 L. J. (M. C.), 214, S. C.

subsequent case of *R.* v. *The Churchwardens of All Saints, Wigan, and others* (*f*), it would seem that they would not be justified in so doing, on the ground that, although the writ of *mandamus* is a prerogative writ and not of right, the *Queen's Bench* only exercises discretion as to granting the writ where it is sought to enforce a *public*—not (as here) a *private* right—or where there is another remedy, and from lapse of time or other reason that by *mandamus* is inconvenient.

The case of *R.* v. *Wigan* is deserving of notice for the following additional reasons :—

1. It decided (reversing the judgment of the Court of *Queen's Bench*) that the Public Works Loan Act (5 Geo. 4, c. 36), required that money, which had been borrowed under that Act for repairing and in part rebuilding and restoring the church of the parish, should be repaid by annual payments within the period of twenty years from the advancement of the money ; and that it expressly and impliedly forbade the making of a rate to repay the commissioners an instalment which had become due some years before, but the payment of which they had not taken any steps to enforce until after the expiration of the twenty years, although they had from time to time demanded the payment thereof and of other instalments subsequently accrued due. And they distinguished this case from the cases of *R.* v. *St. Michael's, Southampton* (*g*), and *R.* v. *Hurstbourne Tarrant* (*h*), above referred to, on the ground that in this case the amount was not made a charge upon the church rates or any known fund of a similar description, as it was in those cases, but

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(*f*) 6 Q. B. (L. R.) 317.
(*g*) 6 E. & B. 807, 25 L. J. (Q. B.) 379.
(*h*) E. B. & E. 246, 27 L. J. (M. C.) 214. In this case the *mandamus* had gone, the Court being of opinion that the delay had been reasonably accounted for.

that there was only the enactment that the money should be repaid by the means specified by the Act, and the bargain which had been made in accordance with it—to wit—that it should be repaid in twenty years from the advancement of the money by annual payments, the funds for which were to be procured by rates made yearly or half-yearly for that purpose.

2. The Court expressed an opinion that on the churchwardens and overseers failing to make the requisite rates they would probably have been liable to a proceeding in the nature of an action for breach of duty ; but that this would not have precluded the commissioners from the right to enforce by *mandamus* the rates *as agreed for.*

3. The Court also laid it down that the question of the liability of the parish was not affected by the fact that various ecclesiastical districts and parishes had been made in the parish since the money was advanced.

It should be further mentioned here that where this is a local Act regulating the affairs of the parish, including the making and recovering of rates for the repair of the parish church, and new parishes for ecclesiastical purposes have been formed within the parish since the date of that Act, the local Act will, notwithstanding the formation of such new parishes, still apply to church rates for the curtailed parish. At least it was so held in the recent case of *St. Giles, Camberwell* (*a*).

As to the second ground of objection,—*That the rate is made for an illegal purpose.*

If the rate be made wholly or in part for purposes foreign to church rate, payment may be successfully resisted.

(*a*) *R.* v. *Richard Roberts and Wm. Hy. Stone, Esquires, Justices of Surrey, and Richard May,* 3 B. & E. 495.

Upon this subject the ecclesiastical commissioners remark:—"It has sometimes happened that by vote of vestry expenses wholly foreign to the church rate have been directed to be paid out of that fund, probably from the impracticability of discharging them out of the poor-rate. This is a practice which should never be permitted, for it tends unduly to swell the nominal amount of the expenses of the church, and expose the rate to the chances of being disputed by any parishioner dissatisfied by his course of proceeding" (*b*).

And in *Gathercole* v. *Wade* (*c*) Dr. *Lushington* is reported to have said:—"There is a class of expenses which have sometimes been defrayed out of the church rate, which have nothing to do with it, or at least are not within the limits beyond which a church rate cannot properly be extended, and which is not within the power of the churchwardens, the vestry, and the parish together to defray out of the rate. I have known 150*l.* for charges connected with making a road attempted to be paid out of a church rate, which would be contrary to every principle."

Thus, if a rate be made for the repair of the chancel as well as the body of the church, except in those parishes where the parishioners are by custom bound to repair the chancel, it is illegal (*d*).

So, if a rate be made for the rebuilding or making any important addition to the church without a faculty

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(*b*) Eccl. Law Rep. 46.

(*c*) Consist. Lond. E. T. 1839. See a note of this case in Burn's Eccl. Law, by Phillimore, tit. "Church" [*Rate*].

(*d*) *Pense* v. *Prowse*, 1 Lord Raym. 59; S. C. nom. *Pierce* v. *Prowse*, 1 Salk. 165, that is if the rate be a rate at common law. That the money may be borrowed for the repair of the chancel as well as the rest of church, and the rate lawfully made to repay it under 3 Geo. 4, c. 36, see *Rippin and another* v. *Bastin*, 2 Ad. & Ec. (L. R.) 386; 38 L. J. Ad. & Ec. 33.

authorizing the proceedings, the rate will be void, as being made for an illegal purpose (*a*).

In like manner, if the rate be make for increasing the stipend for the minster (*b*), or for raising a stipend for the minister, even in cases where the parishioners are the patrons, and there are no tithes or other dues for the support of the minister (*b*), the rate is illegal. The parishioners are indeed, in such case, bound to support the minister; and he may, perhaps, be enabled to recover his dues in the Ecclesiastical Court *eo nomine*, but the Court has no power to enforce the payment of such dues as part of a church rate (*c*).

But the rate will not be bad if the estimate includes a sum for the salary of the parish clerk, for the vestry may lawfully determine to pay a salary to the parish clerk out of the church rate (*d*).

Nor will the mere fact of including in the church rate a small sum for the sidesmen's salary, or for the clerk's and sexton's clothes, or for drink for the bell-ringers on rejoicing days, as it seems, invalidate the rate (*e*); nor will the payment of the expenses of visitation dinners,—at least where the amount is inconsiderable in proportion to the whole rate, though the practice of making such payment out of the church rate is deserving of severe censure. In *Pigott* v. *Bearblock and Newman* (*e*), Sir *Herbert Jenner Fust* is reported to have made the following pertinent observations upon this subject :—

(*a*) *Ante*, c. 2, s. 5.

(*b*) *Tann and Clithero* v. *Owen*, 7 Monthly Law Mag. 86; Burn's Eccl. Law. by Phill. tit. "Church" [*Rate*].

(*c*) *Still and Bunn* v. *Palfrey*, 2 Curt. 902; 1 N. & E. C. 220, S. C.

(*d*) *Kemp and Page* v. *Attenborough*, 30 L. T. 211.

(*e*) *Pigott* v. *Bearblock*, 3 N. E. C. 85.

"Various other charges are objected to; it is only necessary to refer to one—the charge for visitations; for as to the salary for sidesmen, and 20*s.* to the servants of the church, and other charges, it must be recollected that all the accounts were sanctioned by the vestry, no objection was made, and all were allowed and passed. But an objection is made to the expenses incurred at the visitations, the bill in 1840 being 17*l.* 6*s.* 6*d.*, and that of 1839, 14*l.* 13*s.* It appears from the evidence that it is the practice in this parish for the churchwardens and a certain number of persons to dine together upon these occasions, and for the churchwardens to defray the expense of the dinner: and some of the witnesses say, that, although some of the persons present were prepared to pay a proportion of the reckoning, the churchwardens objected, and paid it out of the rates. Now I must say, that this is a practice which the sooner it is abandoned the better; for the proper expenses to be paid out of a church rate are those incurred for the repairs of the church, and for the decent performance of divine worship therein, and not expenses occasioned by entertaining the churchwardens and their friends. As far as the churchwardens and the necessary officers of the church are concerned, it may be proper that a reasonable sum should be allowed for their refreshment and unavoidable expenses; but they are not to lay out the parish money in feasting their friends. It is an improper practice. But is this to vitiate the rate? Certainly not. It has been the practice in the parish: the accounts have been allowed by the vestry and passed, and the amount is not such as, in a rate of this description, should be held to vitiate it. I throw out for the consideration, not of these churchwardens only, but others, that these feastings ought not to continue. But the churchwardens only followed the custom of the parish, and it is a custom which prevails in a

vast number of other places on the occasion of a visitation, though I should be glad to hear that the practice is generally discontinued. I am of opinion that it will not vitiate the rate; the amount, 14*l.* or 17*l.* is too small a proportion of the rate to have that effect."

And in the more recent case of *Rand and Grimwade* v. *Green and Green* (*a*), in which the following items were objected to, namely charges for bell-ringing, sidesmen, their salary and gowns, visitation fees and insurance, Dr. *Lushington* said, "It was objected that certain items contained in the estimate which was laid before the vestry were for payments which cannot be included in a church rate. They are, 16*l.* 8*s.*, bell-ringing; sidesmen, their salary and gowns, 16*l.* 10*s.*; and 3*l.* 10*s.* visitation fees and insurance. I have often stated before what I conceive to be the law on this matter, and I will now repeat it. There are certain charges which of necessity are included in a church rate—such as the expense of repairing the fabric of the church, and for the decent performance of divine worship; secondly, there are other expenses which cannot be included in a rate, except with the knowledge and by the consent of the parishioners; and, lastly, there are items sometimes introduced into the estimate, and included in the church rate, which one can only regret should ever have been admitted there. Whether the items now objected to are admissible is a question which depends on two considerations: *first*, did the parish consent to them; and *secondly*, was the condition and state of the church and the extent of the parish such as to require this outlay? As to the consent of the parish, it was clearly given—an estimate including these charges was laid on the vestry table before the polling commenced. Generally speaking, sidesmen are

(*a*) 6 Jur. (N.S.) 303.

not appointed in ordinary-sized parishes, but in towns of considerable population it is the custom not only to appoint sidesmen, but to pay them. They are appointed for the purpose of assisting the churchwardens in keeping order in the church. I do not think the rate is invalid on this ground."

In the still more recent case of *Tiark and Fenning* v. *Hutton* (*b*), it was held that in a wealthy town parish the expenses of the attendance of a legal adviser at the taking of a poll, and of legal assistance in making the church rate, and a salary of 20*l*. for an organist might legally be charged upon and paid out of the church rate.

For the guidance of the churchwardens in the preparation of their estimates, we subjoin copies of the respective estimates in the recent cases of the Sydenham and Tamworth church rates.

The estimate in the Sydenham case (*c*) was as follows :—

"*Estimate of the expenditure of the churchwardens of the district church of St. Bartholomew, Sydenham, from Easter*, 1860, *to Easter*, 1861.

	£	s.	d.	£	s.	d.
Organist - - - - - -	52	10	0			
Cleaning church and attendant -	35	0	0			
Beadle - - - - - -	20	0	0			
Organ blower - - - - -	5	0	0			
Organ tuner - - - - -	5	0	0			
Clock winder - - - -	5	0	0			
Coals and firing - - - -	15	0	0			
Candles - - - - - -	15	0	0			
Carried forward -	£152	10	0			

(*b*) 3 L. J. Ad. & Ec. 11 ; 1 Ad. & Ec. (L. R.) 270.

(*c*) See *R.* v. *The Official Principal of the Consistorial Court at London and another* v. *Beall*, 2 B. & S. 339 ; Ex parte *Beall*, 12 C. B. (N.S.) 220.

	£	s.	d.	£	s.	d.
Brought forward - -	152	10	0			
Transcribing registers - - -	3	0	0			
Insurance of church - - -	13	11	3			
Repairs - - - - -	45	0	0			
Water and gas rates, printing, stationery, and contingencies -	23	0	0			
				237	1	3
A rate of 2*d.* in the pound on 35,812*l.*, the gross rental of the parish will return - - -				298	8	8
Deduct for empty houses, defaulters, &c., 15 per cent. -	45	0	0			
Cost of collection at 5*l.* per cent. -	13	13	6			
				57	13	6
Estimated net produce of rate - - -				£240	15	2

M. W. Adams,
Benj. Parsey, } Churchwardens."

The following is a copy of the estimate in the Tamworth case :—

" *An estimate of the sums necessary for repairing the parish church, and for other purposes chargeable on the church rate from Easter*, 1861, *to Easter*, 1862.

	£	s.	d.
Repairing the south-east pinnacle, also the mullions to the clerestory on the north side, and other repairs - - - -	40	0	0
Repairing lead roof and flashings - - -	10	0	0
Painting iron fence, gates, &c. - - - -	25	0	0
Repairing windows - - - - -	10	0	0
Carpenter, bricklayer, washing surplices - -	15	0	0
Carried forward - - -	£100	0	0

	£	s.	d.
Brought forward - - - -	100	0	0
Coals - - - - - - - -	10	0	0
Wine and bread - - - - - -	13	0	0
Insurance - - - - - - -	4	2	6
Cleaning and dusting church, &c. - - -	18	0	0
Two beadles - - - - - - -	10	0	0
Brooms, mops, &c. - - - - - -	5	0	0
Churchwardens' expenses, being sworn into office, and fees - - - - -	2	0	0
Ringing prayer bell - - - - -	6	10	0
Winding and cleaning clock, &c. - - -	6	0	0
Making and collecting rate - - - -	10	0	0
Two new stoves, piping, and repairs - -	20	0	0
	£204	12	6

The Tamworth rate was ultimately quashed for inequalities in the assessment (*a*); but both these estimates were upheld. In the latter case the illegality of the item for making and collecting the rate was strongly insisted upon; but Dr. *Lushington* refused to quash the rate on this account. "Nor will I," said the learned judge in giving his judgment, "quash the rate because one item of the expenditure which it was raised to meet was an item of 10*l.* on account of the expenses of collecting the rate." As a general proposition, no doubt the churchwardens are bound to perform the duty of collecting themselves; but some allowance must be made in the case of a populous and extensive parish like Tamworth, where the number of properties liable to assessment was upwards of 2,000 and the aggregate value considerably exceeded 35,000*l.* (*b*).

(*a*) *Hill and Bayley* v. *Askew*, 10 Jur. (N.S.) 777.
(*b*) And see *Tiark and Fenning* v. *Hutton*, 35 L. J. Ecc. 11; 1 Ecc. (L. R.) 270.

For the further guidance and assistance of the churchwardens, one more estimate, that of the Southminster church rate (*a*), which was upheld by Dr. *Robertson*, judge of the *Consistory Court of Rochester*, is subjoined, and is as follows:—

Ordinary Expenses.

	£	s.	d.
Salary of church clerk	10	0	0
Of sexton	5	0	0
Of organist	7	16	0
Of beadle and charwoman	5	0	0
Allowance to ringers	5	0	0
Insurance of church	2	14	0
Coal for vestry	1	0	0
Coke for church stoves	4	0	0
Tuning organs	5	0	0
Winding up church clock	3	0	0
Sacramental elements	3	0	0
Parchments and copying registers	1	14	0
Visitation fees	0	15	6

Extraordinary Expenses.

New bell-ropes, and repair of bells	2	0	0
Cloth for communion table	7	0	0
Repairs of churchyard fence	5	0	0
Repairing windows	5	0	0
Repairs	5	0	0
Incidentals, being 10 per cent. on the above	7	15	0
	£85	14	6

(*a*) See *Kemp and Page* v. *Attenbury*, 30 L. T. 211.

The rate in this case was afterwards quashed in the Court of *Arches* for grounds unconnected with the legality of the estimate; but so far as regards the question of the validity of the estimate, it is believed the churchwardens may safely rely upon the case, with this caution, that to render visitation fees legally payable, and therefore chargeable to the church rate, there must have been a custom to pay them (*b*), though according to the Court of *Common Pleas* it will be sufficient if the custom be to pay a *reasonable* fee—it need not be to pay a *fixed* amount (*c*).

It should be mentioned here that the word "repairs" in the Church Building Acts includes the expenses of divine service and otherwise incidental to the office of churchwarden, as well as the expenses of repairing the fabric of the church, and that a rate for the repair of a district parish church under 58 Geo. 3, c. 45, may lawfully be made for all these purposes (*d*).

It may be further mentioned here that by 21 & 22 Vict. c. 81, s. 23, authority is given to the Crown by order in council, upon the representation of one of the secretaries of state, to cause such acts as may be necessary to be done by or under the directions of the churchwardens or other persons having the care of any vaults or places of burial for preventing them from becoming or continuing dangerous or injurious to the public health; but as the statute

(*b*) See *Shepherd and another* v. *Payne and another*, 12 C. B. (N.S.) 414; 31 L. J. C. P. 297, S. C., affirmed in error, but on a different ground. See 16 C. B. (N.S.) 132; 33 L. J. C. P. 158; the amount of these fees, when payable, is now regulated by the table of fees made under the authority of 30 & 31 Vict. c. 135. *Vide post*, cap. 5, s. 1, and Appendix, p. lxxii.

(*c*) *Shepherd and another* v. *Payne and another*, 12 C. B. (N.S.) 414; 31 L. J. C. P. 297, S. C.

(*d*) *R* v. *The Official Principal of the Consistorial Court of London*, 2 B. & S. 339; ex parte *Beall*, 12 C. B. (N.S.) 220. And see *Chesterton* v. *Farlar*, 1 Curt. 345.

directs that the expenses incurred in and about the doing thereof shall be paid out of the poor rates of the parish, they cannot lawfully be charged upon or paid out of the church rate.

The more common reason, however, for resisting the rate on the ground that it was made for an illegal purpose, is, that it was made, in part or in whole, for retrospective purposes.

It is a general rule with respect to parish rates, founded on obvious principles of policy and justice, that they are not to be made *retrospectively*. The payers being a fluctuating body, nothing, generally speaking, is more just or more likely to induce to economy, than to hold that they who create a charge shall themselves bare it (*a*); and upon this principle it is clearly settled that no rate can be legally made for the reimbursement of churchwardens, because that would be to shift the burthens from the parishioners at the time to future parishioners (*b*).

The regular way is for the churchwardens to raise the money beforehand, by a rate made in the regular form for the repairs of the church, in order that the money may be paid by the existing inhabitants at the time, on whom the burthen ought properly to fall (*c*).

The same principle is applicable to rates made for the repayment of money borrowed under the Church Building Acts upon the security of church rates.

(*a*) Per *Denman*, C. J., in delivering the judgment of the Court in *R.* v. *Churchwardens of Dursley*, 5 A. & E. 10.

(*b*) *Lanchester* v. *Thompson*, 5 Mod. 409; *Lanchester* v. *Tricker*, 1 Bing. 201; *Chesterton and Hutchins* v. *Farlar*, 1 Curt. 345; *Farlar* v. *Chesterton and Hutchins*, 2 Moore, P. C. 330; *Piggott* v. *Bearblock and Newman*, 3 N. E. C. 85; 4 Moore, 299.

(*c*) *R* v. *Archdeacon of Bradford*, 12 East, 556.

This was decided by the Court of *King's Bench*, in *Rex* v. *Churchwardens of Dursley* (*d*). In that case a rule *nisi* had been obtained calling upon the churchwardens of Dursley to show cause why a *mandamus* should not be granted commanding them to pay to *Charles Bruce Warner*, Esquire, the instalments which had become due and were unpaid of the sum of 350*l.* borrowed under the provisions of 59 Geo. 3, c. 134, and of the subsequent Acts in furtherance of the same object, and the arrears of interest due on 300*l.*, part of the said sum, or to raise by rate, pursuant to the said statute, a sum sufficient for that purpose, and pay the same to the said *C. B. Warner*.

It was objected that the churchwardens had no power to raise the rate, as the expenses had been incurred before the money was borrowed.

Lord *Denman*, C. J. (in delivering the judgment of the Court), after stating the general principles as to the illegality of retrospective rates, proceeded : — "The statute has to a certain extent modified this general rule, and the churchwardens are authorized, with the sanction of the vestry, bishop, or incumbent, to borrow on the credit of the rates such sum of money as shall be necessary for defraying the expense of repairing the church; and they are empowered and required to raise, by rate, a sum sufficient from time to time to pay the interest and not less than 10 per cent. of the principal, until the whole of the money so borrowed shall be repaid.

"It appears to us that all these provisions point clearly to the limits of departure from the general principle above stated. The consent of the incumbent and bishop appears to have been thought necessary in order to see that the

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(*d*) 5 A. & E. 10.

repairs should be of that onerous and yet permanent nature which might properly be thrown in part on the payers of succeeding years. Their consent, and that of the vestry, have the effect also of securing the parish from an improvident outlay; and finally, the provision that the principal and interest shall be paid in ten instalments, which ought in our opinion to be annual, secures the participation of the existing ratepayers in the discharge of the loan, and prevents it from becoming a burthen at any definite period on their successors.

"These obvious purposes of the Act, so necessary to prevent abuses of the power given by it, can only be secured by an adherence to the general rule stated above, in all particulars not specially provided for by the clause. We are therefore of opinion that the rate now sought to be imposed would not be authorized by the statute, and of course the present rule must be discharged (*a*).

These observations are equally applicable to the case of money borrowed under 58 Geo. 3, c. 45.

If the rate be in fact retrospective, the objection to its validity will equally prevail, although it may not appear to be retrospective upon the face of it, for on principle there is no real distinction between the case of a rate on the face of it retrospective and a rate intended to cover debts or parts of a debt previously incurred. It cannot be maintained that the Court is bound to set aside a church rate when the party making it had avowed an illegal object on the face of it, and to give force and effect to a

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(*a*) See *Piggott* v. *Bearblock and Newman*, 3 N. E. C. 85; 4 Moore 399, S. C.; in which the authority of *R.* v. *The Churchwardens of Dursley* was expressly recognized and acted upon by the *Judicial Committee* of the *Privy Council*. See also the observations of the Court of *Exchequer Chamber*, in *R.* v. *The Churchwardens of All Saints, Wigan, and others*, 9 Q. B. (L. R.) 317.

rate when the object, though not avowed, was equally clear and illegal. The consequence would be absurd; it would be in the power of any vestry, by shaping the heading of the rate to suit their own purposes, to violate the law to any extent (*b*).

In this latter case, however, the objection to the rate more properly falls under the third ground of resistance, namely, "that the rate is unnecessary" (*c*).

Although a retrospective rate in whole or in part is bad, yet when the sums objected to on this account are trivial, as compared with the whole amount of the rate, the Court will be justified in leaving them entirely out of consideration, and enforcing the rate (*d*).

This observation is of course equally applicable to cases where the objectionable items are illegal upon any other ground (*e*).

(*b*) *Chesterton and Hutchins* v. *Farlar*, 1 Curt. 345; *Tozer* v. *Child*, 27 L. T. 100.

(*c*) *Farlar* v. *Chesterton and Hutchins*, 2 Moore, P. C. 330. See *post*.

(*d*) *Chesterton and Hutchins* v. *Farlar*, 1 Curt. 435. But see the next note.

(*e*) See the observations of Sir *Herbert Jenner Fust*, in *Piggott* v. *Bearblock and Newman*, 3 N. E. C. 85, *supra*. But see the report of this case, on appeal to the Judicial Committee of the Privy Council, as given in the *Jurist* (see 8 Jur. 479), where Lord *Brougham*, in delivering the judgment of the Court, is made to say, that an illegal payment of any amount, *however small*, will vitiate the rate; although nothing of this kind appears in the report of the same case before the Privy Council, in *Moore* (see 4 Moore, 399), or in the *Notes of Ecclesiastical Cases* (see 3 N. E. C. 85). It should also be mentioned that in the case of *Tozer* v. *Child and another*, at the Sittings after Trinity Term, 1856, before Lord *Campbell*, in which the question of the validity of a church rate arose, that learned judge intimated that any illegal item would make the rate void, and, held it to be void, by reason of a small subscription to a society for the protection of life, for securing the use of a fire escape for the parish. It is believed that there is no report of this decision, but the author can vouch for the correctness of the statement, having been one of the

It must be remembered here, that by a retrospective rate is to be understood a rate for defraying the expenses of a *past* year. A rate for the expenses of the *current* year, whether incurred before or after the making of the rate, is perfectly legal, and cannot be objected to as a retrospective rate (*a*).

And if a rate be made for the payment of a debt as soon as it has become due in the ordinary and regular course of business, it will not be invalid as a retrospective rate. This point was decided in the recent case of *R.* v. *The Churchwardens of St. Michael, Southampton* (*b*), the facts of which, so far as they relate to the present question, were as follows. In 1826, a resolution of vestry was passed for borrowing a sum of 2,000*l.* under 58 Geo. 3, c. 45, on the security of church rates, for enlarging the parish church of *St. Michael, Southampton*, and the requisite consents were duly obtained. The work was contracted for by *Hayter* and *Foot*, who commenced it in that year, and completed it in March, 1830. At the time of the completion of the work, the sum of 400*l.* remained due to *Hayter* and *Foot*, and it was arranged between them and the vestry that the sum should be treated as a loan to the churchwardens, and secured on the church rates as part of the said sum of

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counsel engaged in the case. In previous editions of this work, it was suggested that a distinction might possibly be made in this respect between those cases in which the illegality does, and those in which it does not appear upon the face of the rate. See the observations of Lord *Denman* in *R.* v. *Sillivant*, 4 A. & E. 354; 5 N. & M. 640. But in *Tozer* v. *Child and another*, Lord *Campbell* repudiated this distinction, and said that the *dictum* of Lord *Denman* in *Rex* v. *Sillifant*, that the objection to the purpose for which a church rate good on the face of it is made, can only be raised by excepting to the churchwardens' accounts, is at variance with *Farlar* v. *Chesterton*, and other solemn decisions.

(*a*) *Farlar* v. *Chesterton and Hutchins* 2 Moore, P. C. 330; *Butt* v. *Fellowes*, 3 Curt. 608.

(*b*) 25 L. J. Q. B. 379; 6 E. & B. 807, S. C.

2,000*l.*, so agreed to be borrowed on the security of the church rates. Bonds for securing the money were accordingly given to *Hayter* and *Foot* on the 29th March, 1830. It was held that these bonds were given to secure a *present* debt as soon as it became due, and not for a *past* debt, and that they were not bad as being retrospective. Mr. Justice *Erle*, in delivering judgment, said, "the work was done between the 29th June, 1826, and the 29th March, 1830. The bonds were given on the 29th March, 1830, to secure 400*l.*, the balance which then had accrued due to Messrs. *Foot* and *Hayter* on the completion of their contract. The resolution to borrow ought not to be acted on before the money is wanted for payment of the charge to which it relates; any loan before that time would be a waste of interest—the 400*l.* here secured appears to be the last instalment of the contract for 2,300*l.*; and there is nothing to show that the payment was not made as soon as it was due in the ordinary and regular course of business. It was therefore a loan to pay, not a past debt, as described in *The King* v. *Dursley*, but a present debt, as soon as it became due" (*c*).

And it would seem that the costs of a suit may lawfully be provided for by a rate made in the year in which the suit terminated, although it may have been commenced in a previous year, for they cannot properly be taken into

(*c*) It was further objected in this case that the transaction was not within the statute, on the ground that it was not a *loan* but a *charge of a debt* upon the rates. But the *Court* held that it was a *loan*, and referred to *Hunt* v. *Nash*, 2 Cr. M. & R. 337, *Hooper* v. *Stevens*, 4 A. & E. 71, and *Turney* v. *Dodwell*, 3 El. & B. 136, in support of this ruling. The transaction was substantially the same as if *Hayter* and *Foot*, had themselves lent the money and taken these bonds, and the churchwardens had then paid them for the work done by returning to *Hayter* and *Foot* the money they had lent.

an estimate till the suit is over, as it often depends on the event whether the suitor will have to pay or receive costs (*a*).

It has indeed been decided by the House of Lords in a case (*b*) which recently came before them, as to the validity of a retrospective rate made under the authority of an Act of parliament for draining the lands of Holderness, in the East Riding of the county of York (*c*), and there is no rule of law which prohibits a retrospective rate. They said that in every case of rating, the question was whether the Acts under which a rate was made either expressly or impliedly prohibits such rate from being retrospective, and as the Act in question did not do so, they held the rate to be good. The counsel who argued in support of the rate distinguished the case under consideration from that of parish rates, and did not deny that parish rates must not be retrospective; nor does there seem to be anything in the judgment of the House of Lords which militates against this position, as a *general rule.* At the same time it certainly does not seem to support the view taken by Sir *Herbert Jenner Fust* in *Chesterton and Hutchins* v. *Farlar*, and to show that that learned

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(*a*) See *R.* v. *Read and others*, 18 L. J. (M. C.) 164. *R.* v. *Huntsworth*, 33 L. J. (M. C.) 136, *supra*, p. 224. That law expenses properly incurred may lawfully be charged upon a rate, see *Ibid*, and see also *R.* v. *Inhabitants of Essex*, 4 T. R. 594; *R.* v. *The Commissioners of Sewers for the Tower Hamlets*, 1 B. & Ad. 322; *R.* v. *Micklefield*, 1 Bott. 103, pl. 124; Cald. 537, *Tiark and Fenning* v. *Hutton*, 35 L. J. Ec. 11; 1 Ad. & Ecc. (L. R.) 270. But not if they be incurred unnecessarily and improperly, although *bonâ fide*, under the advice of counsel, and with the sanction of the vestry. *Reg.* v. *The Great Western Railway Company*, (Burnham Rates), 13 Q. B. 327. It would seem however, not to be absolutely necessary to procure the sanction of the vestry before incurring these expenses. See *R.* v. *Street*, 18 Q. B. 682.

(*b*) *Harrison* v. *Stickney*, 2 H. of L. Cas., 108.

(*c*) 2 Will. 4, c. 1. (local and public).

civilian was right when he said that a retrospective church rate was not *necessarily bad* (*d*).

As to the third ground of objection—*That the rate is unnecessary.*

It is absolutely essential to the validity of a church rate. that it be necessary for the purposes for which it is made (*e*),

If, therefore, the churchwardens are in the actual possession of funds, clearly applicable to church rate, and sufficient, if so applied, to render the rate unnecessary, the Court will be bound to pronounce against the validity of the rate (*f*).

In like manner, if there be an uncollected rate, such uncollected rate being sufficient, and the churchwardens able by their own exertions to collect it, the Court will refuse to recognize the validity of the new rate (*f*).

But if the churchwardens have done all they can to recover the rate, but there still remains a large sum uncollected, which the parties are unable to pay in consequence of their poverty, they may, as it seems, in such case, lawfully enforce the payment of a subsequent rate (*f*).

But if the outstanding funds relied upon as invalidating the rate be not matter of ecclesiastical jurisdiction, but

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(*d*) See *Chesterton and Hutchins* v. *Farlar*, 1 Curt. 345; and see the observations of *Cresswell*, J., on the case of *Lord Maynard* v. *Brand*, 3 Phil. 501, in his judgment in *Gosling* v. *Veley and Joslin* (in error), 19 L. J. (Q. B.) 111. See also the observations of Lord *Langdale*, M. R., in *The Attorney General* v. *The Corporation of Lichfield*, 11 Beav. 120; 17 L. J., Chan. 472; which though made with reference to *borough* rates, are, it is submitted, equally applicable to *church rates;* and see *Jones* v. *Johnson and Morgan*, 5 Exch. 862, affirmed in error, 21 L. J. (M. C.) 102.

(*e*) *Smith and Wills* v. *Dixon*, 2 Curt. 264; *Varty and Mopsey* v. *Nunn*, 2 Curt. 877; 1 N. E. C. 191, S. C.; *Nunn* v. *Varty and Mopsey*, 3 Curt. 352; 2 N. E. C. 108, S. C.

(*f*) *Varty and Mopsey* v. *Nunn*, 2 Curt. 877; 1 N. E. C. 191, S. C.; *Nunn* v. *Varty and Mopsey*, 2 Curt. 352; 2 N. E. C. 108.

consist of money belonging to an estate, given for the benefit of the church, or in aid of church rate, the Court will not on this ground decree against the rate, as it cannot deal with the churchwardens, or other persons, in whom these funds may be vested, in their character of trustees, and has no power to compel the collecting of the money (*a*).

And it seems that in all cases of doubt or difficulty with respect to the outstanding fund (whether such fund be matter of ecclesiastical jurisdiction or not) the Court will decide in favour of the rate; for the church must not fall down, or necessaries for divine service be wanting, until difficult questions of law are decided (*b*).

And it would seem also, that where the vestry have allowed the churchwardens' accounts of the previous year, the subsequent rate cannot be objected to as excessive, on the ground that items were allowed which ought not to have been paid out of the church rate, the Court having no power to open the matter (*c*); and this certainly cannot be done unless it be conclusively shown that the items are altogether illegal (*c*).

It is upon the principle that it is essential to the validity of a church rate that it be necessary for the purposes for which it is made, that an excessive rate,

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(*a*) *Varty and Mopsey* v. *Nunn*, 2 Curt. 877; 1 N. E. C. 191, S. C.; *Nunn* v. *Varty and Mopsey*, 3 Curt. 352; 2 N. E. C. 108. It was upon this principle that Dr. *Phillimore*, as Chancellor of the *Consistory Court of Gloucester* laid it down in *Hopton and Quarrell, Churchwardens of Kemerton* v. *The Ministers and Parishioners of Kemerton*, 6 N. E. C. 74, that no agreement entered into amongst the parishioners as to the repair of their church could bar the ordinary from the exercise of the undoubted right and power he possesses to compel the parishioners to repair their parish church.

(*b*) *Varty and Mopsey* v. *Nunn*, 2 Curt. 877, 1 N. E. C. 191; *Nunn* v. *Varty and Mopsey*, 3 Curt. 352; 2 N. E. C. 208.

(*c*) *Tiark and Fenning* v. *Hutton*, 35 L. J. Ad. & Ec. 11; 1 Ad. & Ec. (L. R.) 270.

that is a rate for a much larger sum than is required, has always been held to be illegal (*d*); for an excessive rate is unnecessary to the extent that it is excessive, and the Court having no power to amend the rate (*e*), if it be bad in part, it is bad altogether; such a rate therefore, is altogether illegal, because, as a whole, it is clearly unnecessary.

It is chiefly for the purpose of guarding against an excessive rate, that the churchwardens are bound to submit to the vestry an estimate of expenses before they can call upon them to grant the rate (*f*); and there can be no doubt that the Court would look with great suspicion upon a rate which had been made without such estimate, and require the most satisfactory evidence that it was necessary and not excessive (*g*).

And if the rate granted materially exceed the amount mentioned in the estimate, it is *primâ facie* a bad rate for the presumption is that the churchwardens included in the estimate, as it was their duty to do, all the legal demands that would be made upon them, and that there were no other expenses likely to be incurred for which a rate would be required (*e*); but the estimate is only *primâ facie* evidence of the proper amount to be raised (*h*), and it is open to the churchwardens to show the propriety of the sum actually assessed (*e*).

(*d*) See *Brettell* v. *Wilmot and King*, 2 Lee 548; *Smith and Willis* v. *Dixon*, 2 Curt. 264; *Farlar* v. *Chesterton and Hutchins*, 2 Moore, P. C. 330. See also the observations of Sir *S. Lushington*, in *White and Jackson* v. *Beard*, 2 Curt. 501.

(*e*) *Smith and Willis* v. *Dixon*, 2 Curt. 264.

(*f*) *Ante*, p. 167.

(*g*) See *Brettell* v. *Wilmot and King*, 2 Lee, 548; *Medland and Brown* v. *Paine*, 4 Jur. (N.S.) 1283; 7 Week. Rep. 357.

(*h*) *Smith and Willis* v. *Dixon*, 2 Curt. 264; and see *ante*, pp. 97, 167.

For example, they may show, in support of the rate, that it was granted with a view of including legal expenses not included in the estimate; as the re-casting of bells omitted in the estimate through fear that the parish would refuse the necessary amount (*a*).

On the other hand, in the recent case of *Kemp and Page* v. *Attenborough*, where the estimate, after specifying various items for which the rate was made, contained the following entry,—"incidentals, being 10 per cent. on the above,"—it was held that this did not on the face of it violate the rate as illegal and excessive, and the libel was admitted to proof (*b*).

The estimate on which the rate was made in this case will be found set out at length in a former page (*c*). In giving judgment on this point, in the *Consistory Court of Rochester*, the learned chancellor, Dr. *Robertson*, is reported to have said, "The next objection I have to consider respects the item called 'incidentals.' It was contended that the incidentals set down at the sum of 7*l.* 15*s.*, being 10 per cent. on the amount of all the items specified, render the rate excessive, and by reason thereof, illegal. In support of this position, it was said that every ordinary expense is set out, and every possible incidental expense provided for, under the general head of 'extraordinary expenses.' I cannot agree to that assertion. Without taxing one's ingenuity or imagination, other items necessary for the performance of divine service might have been set down

(*a*) *Smith and Willis* v. *Dixon*, 2 Curt. 264. That the vestry may take into consideration the probability of certain persons being unable to pay the rate, and regulate the assessment accordingly, see the observations of *Wilde*, C. J., in *Gosling* v. *Veley and Joslin* (in error), 19 L. J. Q. B. 111; 12 Q. B. 328, p. 406.

(*b*) *Kemp and Page* v. *Attenborough*, 30 L. T. 211.

(*c*) Page 266.

and specified. I must presume that in a parish having the population of Southminster there are on every Sunday throughout the year a morning and afternoon or evening service: I find no provision whatever in the Churchwardens' estimates for lights, which must be absolutely requisite on many Sundays in the year. Some other necessary items might be stated, which are not specified either in the ordinary or extraordinary expenses, did I think it necessary to pursue this inquiry further. It must be remembered that the rate in question was made in the month of June; in other words, there were nine months to run of the year of office of the churchwardens, in which period many incidents might arise attended with some expense. But there is another circumstance: the estimate of the rate was framed, and properly so, before the repairs were made: the exact expense could not at the date when the rate was carried be to a certainty ascertained. More commonly repairs exceed than fall short of an estimate. The question might—I do not say it necessarily would—have assumed another shape, had all the necessaries been obtained, and all the required work perfected, before the churchwardens gave in their estimate. The sum of 7*l.* 15*s.* for 'incidentals' is not manifestly excessive,—it is not to be assumed that that sum will be misapplied or spent for illegal purposes. If an averment be made and intended to be insisted on that a church rate is excessive, I say on the authority of *Butt* v. *Fellowes* (*d*), the averment must be clearly established."

But it would seem that law costs in a suit not yet determined cannot properly be included in the estimate of the expenses (*e*).

(*d*) 3 Curt. 702. See *post*, p. 280.

(*e*) See *R.* v. *Read and others*, 18 L. J. M. C. 164; *R.* v. *Huntsworth*, 33 L. J. M. C. 131; and see *supra*, p. 274, and note (*a*).

Upon this principle also, as intimated above (*a*), a rate good upon the face of it, but intended to cover illegal expenses, has been held to be invalid.

In delivering the judgment of the Judicial Committee of the Privy Council in *Farlar* v. *Chesterton and Hutchins* (*b*), *Erskine*, J., said, "When a rate upon the face of it purports to be what it really ought to be, a rate for the expenses of the current year, but it is made for a sum avowedly larger than is necessary for that purpose, with a view to enable the churchwardens, out of the moneys levied, to pay off the debts incurred in former years, the rate becomes *excessive*, and therefore illegal, according to the principle laid down by Sir *George Lee* in *Brettell* v. *Wilmot and King*" (*c*).

But in order to invalidate such a rate it must be shown that it is *in fact* excessive and unnecessary for the current expenses of the year, for it is not the possibility or the probability that the money collected will be misapplied which makes the rate excessive (*d*). It seems, therefore, not to be sufficient merely to show that it was originally granted in part for retrospective purposes (*d*).

Before passing to the next heading it should be mentioned, that although the *Ecclesiastical Court* will always uphold a rate properly made for the mere purpose of repairs—that is, of restoration of the fabric to its original state; and although the costs of alterations and additions may, in certain cases, be properly met by a rate; yet, in considering whether a rate providing for such costs is excessive, the *Court* will be bound to take into consideration all

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(*a*) *Ante*, p. 270.
(*b*) 2 Moore, P. C. 330.
(*c*) 2 Lee, 548. That a rate for the consecration of a church is both necessary and valid, see *Warner* v. *Gater*, 2 Curt. 315.
(*d*) *Butt* v. *Fellowes*, 3 Curt. 680.

the circumstances of the parish ; and further, that where it is objected to such rate that it is excessive and illegal by means of the nature of such alterations or additions, the burthen of proving the legal character thereof will lie on the churchwardens, unless a faculty has been granted (*e*).

The fourth objection, namely, *that the defendant has been unfairly assessed,* generally assumes one or more of the three following forms, and it is not unusual to find them all three insisted upon at the same time :—

1. That certain persons who are liable to contribute to the rate have not been included in the assessment:

2. That certain persons included in the assessment have been underrated in respect of the ratable property occupied by them.

3. That the defendant has been overrated in respect of the ratable property occupied by him.

The third objection is a direct complaint that the defendant is unfairly assessed, and the natural presumption is that the defendant is in like manner unfairly assessed in either of the other two cases, and this is the sole reason why he is permitted to insist upon them, which he would not otherwise be allowed to do ; for in cases of subtraction of church rate the party resisting payment ought to be confined to showing either that the rate was illegally made, or that it was made for an illegal purpose, or that his assessment is too high and beyond his fair proportion of the whole rate. In that respect he might show inequality, but he must show that of the whole sum to be raised by the rate he will have to pay more than his just proportion (*f*).

(*e*) *Gough and Cartwright* v. *Jones,* 9 L. T. (N.S.) 610.

(*f*) Per Sir *John Nicholl,* in *Watney* v. *Lambert and Simpson,* 3 Add. 84; and see *Thompson and Sandford* v. *Cooper,* 3 Phill. 640 (n). As to the principles which should regulate the Court in determining whether a rate is unequal or not, see the

As to the first ground, there can be no doubt that *primâ facie* the omission of any person bound to pay makes an unequal rate; but the rate is not necessarily bad on that account, and where the property omitted in the assessment is of trifling value, the objection will not be allowed to prevail (*a*), especially if it be omitted in compliance with a practice that has prevailed in the parish not to include property under a given value (*b*).

In *Lee and Parker* v. *Calcraft* (*c*) payment of the rate was resisted upon the ground that several parishioners occupying premises of from 10*l.* to 13*l.* value per annum were omitted from the rate. It appeared that it had for some time been the practice to omit such persons in order to induce them to occupy and cultivate certain garden grounds in the parish; but it was argued that the rate was nevertheless bad, as it was imperative upon the parishioners to include all ratable property, and they had no power by law to omit a single person. The objection was overruled by Sir *William Wynne*, who declared in favour of the rate with costs.

The principles which guided him in his decision will appear from the following extract from his judgment:—

"It is stated that divers parishioners were not assessed at all, though they were not paupers, and rented premises of from 10*l.* to 13*l.* per annum. It is objected that it is clear law that the parishioners have no power to make exemption; stating two cases, *Rex* v. *St. Catherine's*,

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elaborate judgment of Dr. *Lushington*, in *White and Jackson* v. *Beard*, 2 Curt. 480.

(*a*) *Thompson and Sandford* v. *Cooper*, 3 Phill. 640 (n.); *Smith and Willis* v. *Dixon*, 2 Curt. 264; *White and Jackson* v. *Beard*, 2 Curt. 480.

(*b*) *Thompson and Sandford* v. *Cooper*, 3 Phill. 640 (n).

(*c*) 3 Phill. 640.

Gloucester (*d*), *and another* (*e*), to show that it will avoid a poor rate. Most undoubtedly *primâ facie*, the omission of a person bound to pay makes an unequal rate. It is broadly laid down, I suppose, in the report, that the person omitted is equally liable to pay as another; but does it appear that it was ever laid down that no person on any account may be omitted because he is poor? Would it be to consult the interests of the parish by so doing? The evidence shows that they always have omitted persons not parishioners, not renting to the value of 10*l.*, having many non-parishioners resident to cultivate garden ground, who would be made parishioners. We are not to consider the policy or the humanity of this rule, but whether the parish may make such a rule for the advantage of the parish, for it may be prudent and for the benefit of the parish: it was not taken up on this occasion: it had been used for fourteen years."

It is laid down by *Prideaux* that all such as are so poor as to be excused from paying the poor rate by reason of their poverty, ought also to be excused from paying to the church rate for the same reason (*f*). This principle has been universally acknowledged and acted upon: but it has been contended that the proper way is to assess such persons to the rate, and afterwards, upon satisfactory proof of their poverty, to excuse them from payment; and it seems to have been formerly much doubted whether the vestry can legally, and without invalidating the rate, leave out of the assessment a number of persons occupying in the aggregate property of considerable value, but too poor individually to discharge the sums at which they may be respectively rated.

(*d*) Douglas, 626.

(*e*) Two other cases were cited, *R.* v. *Sandwich*, Doug. 541, and *R.* v. *Maddern*, 1 T. R. 625.

(*f*) Prid. 83, 84.

But the question has recently been decided in favour of the validity of a rate made under these circumstances.

In *Chesterton and Hutchins* v. *Farlar* (*a*), one of the grounds of the opposition to the rate was that it was partial and unequal, and that certain persons were omitted from the assessment to the repairs of the church, who were rated to the relief of the poor, and ought to have been included. The churchwardens prayed the admission of a responsive allegation giving explanations, and assigning reasons why the names had been omitted, namely, that by a special Act of parliament, the poor rates of houses under a certain rental (20*l.*) were paid not by the occupiers, but the landlords, and that the parties themselves who had been omitted were approaching to, or actually in, a state of pauperism, receiving parochial relief. Dr. *Lushington* rejected the allegation, for this reason, that the property omitted was of considerable value, and that although it was not the duty of the churchwardens to exact payment from those who were actually in a state of pauperism, and the other parishioners could not on that account refuse to pay their rates, *yet the law required that all property should be rated* (*b*). The case was taken by appeal into the Court of *Arches*, and the judgment of Dr. *Lushington* upon this head was reversed, and the allegation admitted by the learned judge of that Court, Sir *Herbert Jenner Fust*, who held that the reasons and explanations given were fit to be proved, in order to enable the Court to decide on the validity of

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(*a*) 1 Curt. 345.

(*b*) It seems from the judgment of Dr. *Lushington* in *Varty and Mopsey* v. *Nunn*, 3 Curt. 877, 1 N. E. C. 191, S. C., that he rejected this article, because it could not avail the churchwardens, as they had admitted the rate to be retrospective, and not because of the omission of the names, though he did say that all property ought to be rated.

the grounds assigned for omitting the names. Mr. *Farlar* then appealed to the Judicial Committee of the Privy Council, who affirmed the judgment of Sir *Herbert Jenner Fust* (*c*).

The language of Lord *Truro*, also, in moving the judgment of the House of Lords in the second Braintree case, *Gosling* v. *Veley*, is in favour of the legality of omitting from the rate those who are too poor to pay their assessment. The noble and learned lord is reported to have said :—"The details by which the amount of the rate required would be governed were—the extent of the repair required by the church, the necessary costs of such repair, *the number of persons who ought to be omitted from the rate by reason of poverty*, the amount necessary to defray the expenses incident to public worship, and whether the required amount should be raised by one or more rates." (*d*).

Notwithstanding these authorities, it may, perhaps, be the safer plan to include such persons in the assessment, and to excuse them afterwards. The insertion of their names cannot in ordinary cases materially effect the gross

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(*c*) See *Farlar* v. *Chesterton*, 2 Moore, P. C. 330. There were other grounds of appeal, both to the Court of *Arches*, and to the Judicial Committee of the Privy Council; among others, the decision of Dr. *Lushington*, that the rate was bad, because *retrospective*. This decision was also reversed by Sir *Herbert Jenner Fust*, on the ground that a restrospective rate was not necessarily bad, and that the facts pleaded were fit to be considered by the Court; but the Judicial Committee reversed the judgment of Sir *Herbert Jenner Fust*, and affirmed that of the learned judge of the *Consistory Court*. For the proceedings in the courts below, see *Chesterton and Hutchins* v. *Farlar*, 1 Curt. 345. As to the probability of the learned judge of the Court of *Arches* being right in holding that a rate is not necessarily bad, because it is retrospective, see *Harrison* v. *Stickney*, 2 H. of L. Cas. 108, and see *ante*.

(*d*) See 4 *House of Lords Cases*, p. 779, and see Attree's *Braintree Church Rate Case*, p. 97.

sum to be received by the churchwardens; but their omission may furnish a pretext for resistance to the rate and expose the churchwardens and the parish to considerable annoyance and expense, especially in cases where reasonable doubt may exist as to the ability of any of the parties omitted to discharge the sums at which they might have been respectively rated (*a*).

It seems that where the wrong party is assessed, as for example, the landlord instead of the occupier, this is equally fatal with a total omission, for such assessment is in contemplation of law, a nullity, even though the party assessed should voluntarily pay the rate, as the churchwardens have no power of enforcing the payment, and the rate must be valid or invalid at the time it is made, without reference to subsequent payments (*b*); but if the rate

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(*a*) As to the right of the vestry to regulate the assessments, on the assumption that certain persons will be unable to pay, see *ante*, p. 278, note (*a*). And as to the power of justices to excuse persons who are unable to pay through poverty, on their own application, from the payment of rates, and to strike out their names from the assessments, see 54 Geo. 3, c. 170, s. 11. This statute in terms applies to *any* rates or cesses, and would seem, therefore, to be applicable to church rates, although the consent of the churchwardens and overseers is required.

(*b*) *White and Jackson* v. *Beard*, 2 Curt. 480; but see *Thompson and Sandford* v. *Cooper*, 3 Phil. 640, where Sir *W. Wynne* seemed to be of opinion that the rate might, with the sanction of the parish, be laid on the landlords, where the tenants were poor, and it was evidently for the benefit of the parish that this should be so. See also *Varty and Mopsey* v. *Nunn*, 2 Curt. 877; 1 N. E. C. 161; where Dr. *Lushington*, in speaking of this case, says, "In the case of *Thompson and Sandford* v. *Cooper*, Sir *W. Wynne* held that landlords may be rated instead of occupiers. I mention this because until that decision is reversed, being a decision of the Court of *Arches*, it would be binding upon me, whether I assented to the doctrine or not;" and see *Nunn* v. *Varty and Mopsey*, 3 Curt. 352, where Sir *Herbert Jenner Fust* inclined to the opinion that it was not competent to a third party to take the objection, provided a rate upon the landlord was paid.

be on the occupier, it is not invalidated by being demanded of and paid by the landlord (*c*).

It may be observed here, that in parishes where it is usual to assess stock-in-trade, the omission of *shipping* from the assessment will be fatal to the rate (*d*).

And that if the rate be made for the repayment of money borrowed of the public loan commissioners, under 5 Geo. 4, c. 36, for the repair of the church and chancel, the omission to rate the tithe-owner, or the owner of the tithe commutation rentcharge which represents the tithes, or the glebe lands, will be fatal to the rate (*e*).

And the law would seem to be the same where the money has been borrowed under this statute exclusively for the purpose of repairing and restoring the *body* of the church (*f*).

Nor can the parol agreement of the tithe-owner with the churchwardens to contribute a sum more than sufficient for the restoration of the chancel be considered as equivalent to the rating of the tithes (*g*).

The second and third grounds of objection are so intimately connected, and so necessarily dependant upon each other, that all remarks applicable to the one will be applicable to the other; it will, therefore, be desirable to make a few observations on them both at the same time.

The ecclesiastical judges have frequently severely cen-

(*c*) *Varty and Mopsey* v. *Nunn*, 2 Curt. 877; 1 N. E. C. 191.

(*d*) *Miller* v. *Bloomfield*, 2 Add. 33.

(*e*) *Smallbones* v. *Edney and Lunn*, 3 P. C. (L. R.), 444, *supra*, p. 176, reversing the decision of Sir *R. Phillimore* in the Court of *Arches*. See *Edney and Lunn*, v. *Smallbones*, 21 L. T. 506.

(*f*) *Asterley and others* v. *Adams*, 3 Ad. & Ec. (L. R.) 361.

(*g*) So ruled by Sir *Robert Phillimore* (Dean of Arches) in *Asterley and others* v. *Adams*, supra. It is apprehended that the law would be the same, however formal the agreement may have been.

sured frivolous opposition to the payment of church rates on the grounds of inequality of assessment.

The resistance produces great inconvenience to the parish, as it increases the burthen of the rates ; it excites dispute and animosity, and ought not to be made on slight grounds (*a*).

An attentive perusal of the few reported cases upon this subject must convince any person that he will meet with no favourable consideration from *Ecclesiastical Courts* in his attempts to resist the payment of a church rate, on the ground that he has been unequally assessed. Not that he will fail if he succeed in establishing a *material* inequality ; but in resisting the rate, he stands on his strict right of law. Every presumption is in favour of the fairness of the assessment made by the vestry (*b*) ; the burthen of proof lies upon him—his pleadings must specify the persons underrated (*c*)—he must prove, and satisfactorily prove, a material inequality ; if the matter be left doubtful, he fails in his defence (*d*), and if he fail he will be condemned in costs (*e*).

(*a*) Per Cur. in *Lambert and Simpson* v. *Weal*, 4 Hagg. 91.

(*b*) That the assessment is peculiarly within the province of the vestry, every presumption in its favour, and the party bound to attend, &c., see *ante*, p. 115.

(*c*) *Smith and Willis* v. *Dixon*, 2 Curt. 264 ; that he may plead that in common with other persons he is himself underrated, and that the Court will admit the allegations, although on a review of the whole case it may refuse in his particular instance to pronounce against the rate, see *Edward and Mann* v. *Hutton*, 11 Jur. (N.S.) 474 ; 35 L. J. Ec. 1 ; 1 Ad. & Ec. (L. R.) 21.

(*d*) *Lambert and Simpson* v. *Weal*, 4 Hagg. 91. For an instance where the rate was held bad for inequality, see *Medland and Brown* v. *Paine*, 7 Week. Rep. 357. In that case a paper mill, fitted with valuable machinery, was materially underrated. It should, however, be mentioned that, in addition to this objection, certain property had been omitted from the rate altogether. For another recent instance see *Morton* v. *Tabiner*, 6 Jur. (N.S.) 682.

(*e*) Ib., *Thompson and Sandford* v. *Cooper*, 3 Phill. 640. (n).

The most conclusive evidence is required, where the object is to impugn the assessment of the vestry, and the Court must be satisfied that the witnesses, on whose testimony this is sought to be done, have accurately surveyed and estimated the several premises, or that they are otherwise well qualified to form a judgment upon the nature and value of the property in question. Loose evidence will not be considered sufficient to invalidate the rate, even if the case rested there, and were not opposed by testimony of the same sort, and of equal weight, in favour of the fairness and equality of the rate (*f*).

As the parishioners have no rule to guide them in making the rate, but common estimation as to the value of the property, trifling inequalities in the taxation are not sufficient to set aside the rate (*g*).

It can scarcely be necessary to add that the assessments must be equal as between all the individual properties throughout the entire parish, and that where the parish is divided into townships, it will not be sufficient that it is equal as between the individual properties in the respective townships (*h*).

Nor will it be sufficient in parishes where the Small Tenement Act (*i*) has been adopted, and where the general

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(*f*) *Lambert and Simpson* v. *Weal*, 4 Hagg. 91.

(*g*) *Lilley* v. *Hardy*, 1 Lee 52; *Smith and Willis* v. *Dixon*, 2 Curt. 264. They have, however, now the valuation list under "The Union Assessment Committee Act, 1862," 25 & 26 Vict. c. 103. But the Court will not quash the rate simply because it is not made in accordance with the valuation list under this Act; *Edwards and Mann* v. *Hutton*, 35 L. J. Ecc. 1; 1 Ad. & Ecc. (L. R.) 21; *Barnes* v. *Grant*, 35 L. J. Ecc. 9; 1 Ad. & Ecc. (L. R.) 371.

(*h*) *Hill and Bailey* v. *Haskew*, 10 Jur. (N.S.) 777.

(*i*) 13 & 14 Vict. c. 99, repealed as to poor rates from 29th September, 1869, though still in full force in regard to *highway* rates. See sect. 6 of the "Poor Rate Assessment and Collection Act, 1869," 32 & 33 Vict. c. 41. See the statute in the Appendix, p. xxvii.

property is assessed at its annual value, to assess the small tenements under the value of 6*l.* at three-fourths only, instead of the whole of their annual value, for the provision in the statute which authorizes this to be done has no operation with regard to church rates (*a*).

The fifth ground for resisting the payment of the rate, namely, *that the defendant is assessed in respect of property for which he is not liable*, may be subdivided into three branches.

1. That the defendant is not the *occupier* of the land in respect of which he is assessed.

In such case he may successfully resist the demand, as the party charged must always be the *occupier* of the land (*b*).

But where, in a suit for subtraction of church rate, an error had been made to a small amount in the sum assessed on the defendant, in consequence of certain land, not in the occupation of the defendant, being included in the assessment upon him, the Court held that the rate was not, therefore, void *in toto*, and directed the libel to be reformed, and confined to the land in the occupation of the defendant (*c*).

(*a*) *Hill and Bagley* v. *Haskew*, supra.

(*b*) See *ante*, c. 2, s. 3. As to the rating of landlords instead of their tenants, where the tenants are too poor to pay, *vide supra*, p. 286, and note (*b*).

(*c*) *Hawes and Vicatt* v. *Pellatt*, 2 Curt. 473. This case was in the Court of *Arches*, and was heard by letters of request. In *Asterly and another* v. *Adams*, 3 Ad. & Ecc. (L. R.) 361, in which it was held that the Court was bound by the letters of request and the rate therein mentioned, and could not deal with the rate as amended after the sending of the letters of request, *supra* p. 243, note (*e*), *Hawes* v. *Pellatt* was urged as an authority in favour of the plaintiffs. Sir *Robert Phillimore* in his judgment said, "I was pressed with the case of *Hawes* v. *Pellatt*; but it is enough to say that the circumstances of that case were peculiar. The defendant had no counsel; and this particular point was never

2. That the land for which the defendant is assessed is not liable to be rated, as that is the glebe land, prebendal land, or the like (*d*).

This, of course, furnishes a valid defence; and as the claim to exemption is made in respect of the *land* and not of the *person* charged, it must equally prevail whoever is the occupier; and, therefore, if such lands be of the glebe or endowment of the church, he who is *tenant* of the lands ought not to contribute to the repairs or ornaments, but is as much exempt as the parson would be if the said lands were in his own occupation (*e*).

3. That the land in respect of which the defendant is assessed is not situate within the parish for which the rate is made.

Whenever the defence is insisted upon, and the boundaries of the parish are in consequence called into question, this matter must be tried by the common-law courts, and if the spiritual courts proceed with the case a prohibition will lie. For to judge of the boundaries of parishes is now engrossed wholly by the common-law courts, and the ordinary is absolutely excluded from all jurisdiction in this matter. But anciently it was otherwise; for as long as the division of parishes was only for spiritual matter, as the bishops first made these parishes, so it belonged wholly to

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raised or decided. Moreover, I have caused the letters of request in that case to be laid before me; and I find that the amount of the rate was not specified,—but this Court was only requested to entertain a suit for a church rate generally, so that the hands of the Court were not tied as they are in this instance."

(*d*) *Supra*, p. 176. As to the liability of glebe lands, &c., to be rated to a rate made under the provisions of 5 Geo. 4, c. 36, see *Smallbones* v. *Edney and Lunn* 3 P. C. (L. R.) 444, *ante*, p. 176. That the occupiers of the glebe lands, &c., are nevertheless entitled to vote at vestry on questions of church rate, see *Ranson* v. *Campkin*, 2 Roberts, 358.

(*e*) See *ante*, c. 2, s. 3.

them to determine all controversies about them, and set out the boundaries by which they were parted each from the other. But afterwards, when the limits of parishes were made the limits of temporal offices, as of constables, surveyors of highways, &c., which belong to the temporal jurisdiction, this drew the whole of this matter before the temporal judges into the common-law courts, and there it hath been ever since (*a*).

But to prevent the arising of any trouble from hence, the readiest way is for the churchwardens to do their duty, in taking care that their annual perambulations be duly kept up at the usual time, and the boundaries of their parishes so carefully viewed and settled in them, as to leave no room for any dispute or contest about them. For this is part of their office, and it is a service of no small moment to their parish carefully to discharge themselves herein (*b*).

The right to perambulate parochial boundaries, to enter private property for that purpose, and to remove obstructions that might prevent this from being done, cannot be disputed. It prevails as a notorious custom, in all parts of England,—is recorded by all our text writers,—and has been confirmed by high judicial sanction. *Anderson*, C. J., and the whole Court of *Common Pleas* assert the custom and the right in the most unqualified manner in *Goodday* v. *Mitchell*, Owen, 72 ; Cro. Eliz. 441 ; the pleadings in which are to be found in Cooke's Entries, 651, b. (*c*).

But an entry into a particular house cannot be justified, unless it stand upon the boundary line, and unless it is necessary to enter it for the purpose of effecting the perambulation. Therefore a plea in an action of trespass for

(*a*) Prid. 68, 69, Roll. Abr. Prohibition E.
(*b*) *Id.* 69.
(*c*) Per *Denman*, C. J., in *Taylor* v. *Devey*, 7 A. & E. 412.

breaking and entering the defendant's dwelling-house, that the house was in the parish of B., in which there was an immemorial custom for all the parishioners to go through the house upon their perambulations of the parish boundaries, and a justification under the custom was held insufficient, for not stating that the house was on the boundary line, or that it was necessary to pass through the house for the purpose of the perambulation; and issue having been joined on such plea, and a verdict found for the defendants, it was held that the plaintiff was entitled to judgment *non obstante veredicto* (*d*).

It was even thought at one time that a custom for refreshment during a perambulation might be supported, as due of right from the house or land; but such custom, on being questioned, was held to be invalid (*e*).

Formerly, these perambulations of the boundaries of parishes were more strictly attended to than in modern times (*f*), and though of great use, in order to preserve the bounds of parishes, they were in times of popery accompanied with two great abuses—feasting and superstition—being performed with processions, &c. The injunctions of Queen Elizabeth forbade processions, but retained the useful and innocent part of the perambulations; these superstitions, though at first not easily suppressed, yet being so now, it is to be regretted that the perambulations are not held more regularly (*g*).

It may be well to observe in this place, that, irrespective of the provisions of "The Compulsory Church Rate

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(*d*) *Taylor* v. *Devey*, 7 A. & E. 412.
(*e*) 2 Lev. 163; 2 Rol. Rep. 259; Gibs. 213; and see Rog. Eccl. Law, 614, 615.
(*f*) Rog. Eccl. Law. 614.
(*g*) *Id.* 625; Gibs. Cod. 239.

Abolition Act, 1861" (*a*), separate and distinct parishes under 58 Geo. 3, c. 45 (*b*), new parishes under the New Parishes Acts (6 & 7 Vict. c. 37, 7 & 8 Vict. c. 94, and 19 & 20 Vict. c. 104) (*c*), and district parishes under the first-named Act after the expiration of twenty years from the days of the consecration of their district parish churches (*d*), are not to be deemed parts of the mother parishes for the purposes of church rates, and that the inhabitants of such separate new and district parishes respectively are not liable to be assessed in respect of their property within such parishes to the rates for the repair of the churches of the respective mother parishes (*e*).

It should be remarked here, that in all these cases of resistance to church rate the Court has no power to amend the rate; and it is placed in this situation, that where a suit is brought against an individual who resists the payment of a church rate, it must either pronounce the rate altogether null and void, and relieve him from the payment of the rate altogether, or it must, on the other hand, pronounce for the validity of the rate (*f*).

If the churchwardens establish their case the *Ecclesiastical*

(*a*) 31 & 33 Vict. c. 109.

(*b*) See *Varty and Mopsey* v. *Nunn*, 2 Curt. 877; 1 N. E. C. 191, S. C.

(*c*) *Gough and Cartwright* v. *Jones*, 9 Jur. (N.S.) 82; 7 L. T. (N.S.) 566.

(*d*) Sect. 71, and see *Varty and Mopsey* v. *Nunn*, supra.

(*e*) As to the further exemption of the inhabitants of subdistrict parishes to contribute to the rates for the repair of the churches of the original district parishes, see 3 Geo. 4, c. 72, s. 21.

(*f*) Per Dr. *Lushington*, in *White and Jackson* v. *Beard*, 2 Curt. 490. *Hawes and Vicatt* v. *Pellatt*, 2 Curt. 473, *ante*, p. 290, may appear at first sight to militate against this position, but the Court did not in fact amend the rate in this case: it merely dropped proceedings against the defendant in respect of his assessment upon a particular property, and see *Barnes* v. *Grant*, 11 Jur. (N.S.) 395.

Court will make a decree against the defendant for payment of the rate subtracted, with costs.

It has always been held in the *Ecclesiastical Court* that costs are in the discretion of the Court; not a capricious discretion, but founded on a just consideration of the circumstances of the case, and adhering to general rules and former precedents; these Courts consider it their duty, as far as they can attain those objects, to protect parties in the fair assertion of their just and legal rights, and to check vexatious litigation (*g*).

Upon this principle, and from a desire to protect public officers in the exercise of their duties, it is almost a universal rule, in cases of subtraction of church rate prosecuted by churchwardens, to give them their costs, unless they have acted improperly (*h*), or there is strong ground to justify the defendant in his resistance (*i*).

The decree of the Court *Christian* for payment of the rate and costs must be followed by a monition served upon the party admonishing him to pay the money. The common law method of enforcing the decree in the event of his disobeying the monition was by means of a sentence of excommunication, and of the writ *et excommunicato capiendo*, which issued out of the Chancery on a *significavit* from the Court *Christian* signifying the excommunication. The statute 53 Geo. 3, c. 127, substituted for excommunica-

(*g*) *Burnell* v. *Jenkins*, 2 Phill. 450; *Goodall and Gray* v. *Whitmore and Fenn*, 2 Hagg. 374; 3 Phil. 92; 3 Hagg. 283; 2 Ad. 309.

(*h*) *Goodall and Gray* v. *Whitmore and Fenn*, 2 Hagg. 374.

(*i*) *Clutton* v. *Cherry*, 2 Phill. 387. See further as to costs in such cases, *White and Jackson* v. *Beard*, 2 Curt. 410; *Hawes and Vicatt* v. *Pellatt*, 2 Curt. 473; *Gough and Cartwright* v. *Jones*, 9 L. T. (N.S.) 610. That an appeal will not be allowed on a mere question of costs, where the Court below has exercised a fair discretion, see *Attenborough* v. *Kemp*, 5 L. T. (N.S.) 67; *Richards* v. *Birley*, 10 L. T. (N.S.) 142.

tion a sentence pronouncing the party to be contumacious, and for the writ *de excommunicato capiendo* a writ *de contumace capiendo*, which in like manner issued out of the Chancery on a *significavit* from the ecclesiastical judge signifying that the party was manifestly contumacious.

Under this writ the defendant was taken into custody by the sheriff, or other officers authorized and required to execute the same, and detained in custody until he purged his contempt (*a*), which, until the passing of the statutes, 3 & 4 Vict. c. 93, which authorized his discharge in certain cases, and 12 Vict. c. 14, which enacted that no person should be imprisoned for the non-payment of any church rate for any term exceeding three calendar months, could only have been done by yielding obedience to the decree of the Court, paying the costs incurred therein in consequence of his contempt, and taking the usual oath to submit to the lawful commands of the ordinary (*b*).

Until the passing of the statute 2 & 3 Will. 4, c. 93, this writ could only have been executed within the jurisdiction of the *Ecclesiastical Court* whose decree had been disobeyed; but by section 1 of that statute the writ *de contumace capiendo* might, if the party in contempt should be domiciled either in England or Ireland, and beyond the jurisdiction of such Court, upon *significavit* of contumacy to the lord chancellor, lord keeper, or lords commissioners for the custody of the great seal of England, if the party in contempt should be domiciled or residing in England, or to the lord chancellor, lord keeper, or lords commissioners of

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(*a*) See further, as to this writ, *R.* v. *Mayby*, 3 D. & R. 570; *Kington* v. *Hack*, 1 A. & E. 780; *R.* v. *Ricketts*, 6 A. & E. 537; *R.* v. *Hewett*, 6 A. & E. 547 (n); *R.* v. *Thorogood*, 12 A. & E. 113; 3 P. & E. 629, S. C; *R.* v. *Baines*, 12 A. & E. 210; 4 P. & D. 392, S. C.; 1 Cr. & Phill. 42.

(*b*) *Baker and others* v. *Thorogood*, 2 Curt. 632.

the great seal of Ireland, if he should be domiciled or residing in Ireland, have been issued out of the High Court of *Chancery* in England or in Ireland, as the case might be, and duly executed in any part of England or Ireland accordingly.

This writ *de contumace capiendo* was, moreover, until the passing of the last-mentioned statute, the sole means by which the *Ecclesiastical Courts* were empowered to enforce obedience to their decrees, and being a process against the *person*, was inoperative against persons having privilege of peerage, lords of parliament, and members of the House of Commons. In no instance whatever, under any circumstances, could the property of an individual be attached by the authority of the *Ecclesiastical Court*, or by the assistance of ony other tribunal (*c*).

But this defect of jurisdiction has been remedied by the above-mentioned statute, by which a power is given of enforcing decrees and orders of the *Ecclesiastical Courts* for *payment of money*, against all persons, and *all* decrees and orders of such Courts, whether for payment of money or otherwise against peers, persons having privilege of peerage, and members of parliament, by means of a *sequestration* against the real and personal estate, goods, chattels, and effects of the party in contempt, to be issued out of the High Court of *Chancery*, in England, or in Ireland, as the case may be, and executed within the jurisdiction of such Court, in the same manner and form, and with the like power and effect, as if such sequestration had issued in a cause originally cognizable by and instituted in such Court of *Chancery* (*d*).

And this writ of sequestration is now the only means

(*c*) See Eccl. Law Rep. 67.
(*d*) See sects. 2, 3.

by which the payment can be enforced, except in those cases where a temporary imprisonment may be ordered, if the party has the means of paying under the 5th section of "The Debtor's Act, 1869" (*a*); for it is enacted by the 4th section of that Act that with the exceptions thereinafter mentioned—which do not include the nonpayment of a church rate ordered to be paid by decree of the Ecclesiastical Court,—no person shall, after the commencement of that Act, be arrested or imprisoned for making default in payment of a sum of money.

It only remains to be observed, that the remedy against the *persons* of Quakers in suits for subtraction of any great or small tithes, modus or composition for tithes, rate, or other ecclesiastical demand, was taken away by legislative enactment (*b*).

SECTION IV.

On the Extent of the Liability of the Parishioners with respect to the Repairs of Churches; and on the Methods of enforcing such Repairs.

If the vestry grant a rate not manifestly inadequate and collusive the churchwardens should accept it, and apply it as far as it goes, and when exhausted, another vestry should be convened for a further rate; for the spiritual court has no power to decide on the *quantum* of the rate—that is a matter peculiarly for the consideration of the vestry (*c*).

(*a*) 32 & 33 Vict. c. 62.

(*b*) See 5 & 6 Will. 4, c. 74, explained and amended by 4 & 5 Vict. c. 36. But *quære* whether those Acts relate to church rates? See *ante*, p. 239, *note* (*d*).

(*c*) *Greenwood and Spedding* v. *Greaves and others*, 4 Hagg. 77; and see *ante*, c. 2.

With a view of ascertaining the duty of the churchwardens in the event of the vestry altogether refusing a rate, it will be desirable, in the first place, to consider a little more fully than has been yet done the nature and extent of the legal obligation imposed upon a parish with reference to the repair of the parish church.

"The obligation by which the parishioners, that is, the actual residents within, or occupiers of lands and tenements in every parish, are bound to repair the body of the parish church whenever necessary, and to provide all things essential to the performance of divine service therein, is an obligation imposed on them by the common law of the land (*d*).

"Such then being the law of the land, it follows, as a necessary consequence, that the repair of the fabric of the church is a *duty* which the parishioners are compellable to perform, not a mere *voluntary* act, which they may perform or decline at their own discretion; that the law is imperative upon them, absolutely, that they do repair the church, not binding on them in a qualified limited manner only, that they may repair or not, as they may think fit, and that where it so happens that the fabric of the church stands in need of repair, the only question upon which the parishioners, when convened together to make a rate, can by law

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(*d*) This obligation of the parishioner to repair the body of the church attaches in all cases where there is no special custom or legislative enactment controlling it. In *Varty and Mopsey* v. *Nunn*, 2 Curt. 877; 1 N. E. C. 191, S. C., confirmed on appeal (see *Nunn* v. *Varty and Mopsey* 3 Curt. 352; 2 N. E. C. 108), it was argued that the custom existed only in relief of the incumbent, who would otherwise have been bound to repair as the freeholder, and that it did not apply to cases where the freehold was vested in third parties, as trustees, &c.; but it was held that the obligation was general by the common law of the land, and that the fact of the freehold being out of the incumbent did not discharge the parishioners from this liability.

deliberate and determine, is not whether they will repair the church or not (for upon that point they are concluded by the law), but how and in what manner the common law obligation so binding them may be best and most effectually, and at the same time most conveniently and fairly between them, performed and carried into effect. The parishioners have no more power to throw off the burthen of the repair of the church than that of the repair of bridges and highways, the compelling of the performance of the latter obligation belonging exclusively to the temporal courts, whilst that of the former has been exercised usually, though, perhaps, not necessarily exclusively, by the spiritual courts from time immemorial (*a*)."

The above passages are cited from the judgment of the Court of *Exchequer Chamber*, delivered by the Chief Justice *Tindal*, in the celebrated case in that court, of *Veley and another* v. *Burder*, (in error) (*b*), the first *Braintree case*. The law as so laid down was subsequently unanimously affirmed by the judges of that Court in the not less celebrated case of *Gosling* v. *Veley and Joslin* (in error) (*c*), the second *Braintree case*, and Chief Justice *Wilde*, in delivering his judgment in the last-named case, said that the obligation was so well established, that no lawyer of any pretensions could be bold enough to express any doubt upon the subject.

In the first *Braintree case*, Chief Justice *Tindal* in

(*a*) Per *Tindal*, C. J., in delivering the judgment of the Scac. Cam. in *Veley and another* v. *Burder*, in error, 12 A. & E. 265; 4 P. & D. 475, S. C. See also this judgment published from Mr. *Gurney's* short-hand notes, by Rivington, Waterloo Place, Pall Mall.

(*b*) 12 A. & E. 265.

(*c*) 4 H. of L. Cas. 679; and see Mr. Attree's edition of this case in the House of Lord, published by Shaw and Sons.

commenting upon the statute *de circumspecte agatis* (*d*), further says :—

"Now upon the construction of this statute no doubt has ever been raised or can exist, but that the spiritual court has power and jurisdiction by ecclesiastical censures, to compel the churchwardens to perform their duty in relation to the repairs of the church ; to compel the parishioners to perform their duty in providing the means to make such repairs ; and after a legal rate has been imposed to compel each individual to contribute the sum assessed upon him. But the case before us is neither the case of a proceeding by the spiritual court against churchwardens for not causing the church to be repaired, nor of a proceeding of the spiritual court against parishioners who have refused to join in making a rate ; nor of a proceeding against the individuals named in a rate, which has been made by the churchwardens and parishioners (*e*). And in another part of the judgment, he says that, "all the authorities agree, that there is one mode of carrying the law into effect, and that *the usual and ordinary mode*, which is free from all possible exception, viz., that the churchwardens, whose duty it is to raise the money for the repair of the church, and to make the repairs, should convene the parishioners together by due notice, and that the majority of those who are so assembled should make an order for a rate, which will bind the whole parish" (*f*).

The parishioners, as has already been observed (*g*), have not been relieved from the common law obligation of repairing their church by "The Compulsory Church Rate Abolition Act, 1868" (*h*). Nor, as it is submitted, has this

(*d*) 13 Edw. 1, stat. 4.
(*e*) 12 A. & E. 310.
(*f*) See *Id.* 303.
(*g*) See p. 96.
(*h*) 31 & 32 Vict. c. 109.

statute in point of law, whatever may be its practical effect, deprived the Ecclesiastical Court of its power to enforce this obligation. The statute, after reciting that church rates have for some years ceased to be *made* or *collected* in many parishes, and that it is expedient that the power to compel *payment* of church rates should be abolished, proceeds to enact that no suit shall be instituted or proceeding taken to enforce or compel the *payment* of any church rate (*a*). But far from prohibiting the *making* of them, it expressly enacts that the Act "shall not affect the making, assessing, receiving or otherwise dealing with any church rate, save in so far as relates to the *recovery* thereof (*b*), and to this extent only—no doubt practically a very serious extent—does it interfere with the powers which the Courts previously possessed for enforcing the repair of churches.

Great then as may be the difficulty of enforcing this obligation, and much as that difficulty may be increased by "The Compulsory Church Rate Abolition Act, 1868" (*c*) it is submitted that the Court *Christian* still has by law the power of compelling the parishioners to repair their church It would not be right, therefore, to pass over this subject altogether; but, under the circumstances, it is proposed to deal with it very briefly.

Two questions, therefore, will have to be considered:—

First, the *extent* of the liability of the parishioners:

Secondly, the *methods* by which the parishioners may be compelled to effect the required repairs.

It is clearly settled that the liability of the parishioners extends only to *necessary* repairs, that is, to such repairs as

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(*a*) 31 & 32 Vict. c. 109, s. 1.
(*b*) *Id.*, sec. 6.
(*c*) 31 & 32 Vict. c. 109.

are necessary for the sustentation of the fabric of the church, and the preservation and protection of the churchyard, and to the providing of such utensils, &c., as are necessary for the decent celebration of divine service, and the due administration of the holy sacraments and the other rights and ceremonies of the church.

It becomes, therefore, necessary, in considering this part of the subject, to bear in mind the distinction, not capable of being exactly defined, between those items which the law absolutely requires the parishioners to provide, and those other expenses which a parish is not bound to incur, but which may be made a legal charge on the church rate by the sanction of a majority of the vestry (*d*).

This latter description of expenditure includes alterations in the church, the erection of galleries and seats, payment of organist, beadles, &c., and all matters tending to the more comfortable accommodation of the parishioners attending divine service, and the performance of the rites of the church (*e*).

As regards church ornaments in general, the law is now well understood and settled. The consent of the parishioners is not indispensably necessary for their erection (*f*); but it is in all cases necessary to charge the parish with any expense for the support of them after they have been put up. A faculty for their erection does not render it imperative upon the parishioners to repair them; the ordinary has no power to require this, and whether they have been newly erected or not, the parish cannot be compelled to repair them against their consent. It may, indeed, sometimes be difficult to distinguish whether any

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(*d*) Eccl. Law Rep. 43.
(*e*) *Ib.* 46.
(*f*) See *ante*, p. 199.

particular addition is to be deemed necessary or ornamental, and in some few instances, such addition may be necessary in one case, and ornamental only in another, as an organ, which is necessary in a *cathedral* church, but not in a *parish* church, however fit and proper it may be to have an organ there (*a*).

But this constitutes the only difficulty, and when it has once been ascertained, the law is clear. If the thing be necessary, the parish are bound to repair; if not, they cannot be compelled to do so.

The doctrine that the liability of the parishioners extends only to absolute necessaries has been recognized and acted upon to the fullest extent, and is well illustrated by the language of Sir *William Wynne* in *Pearce and Hughes, Churchwardens of Clapham* v. *The Rector, Inhabitants, and Parishioners thereof* (*b*). In that case a faculty for the erection of an organ in a parish church was opposed upon the ground that no provision was made for the future repairs, nor for the permanent salary of an organist; but this was held no sufficient reason for withholding the faculty. "I do not think," said the learned judge, "that if a faculty had been obtained for an organ, and if there be no permanent provision for its support, and succeeding parishioners should not choose to take upon themselves the expense, there is any authority to oblige them to have it played upon, especially if a clause be added, which is often done, that the expenses shall be defrayed by voluntary contributions (*c*). What consequences would ensue? That the organ would not be played upon. It might

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(*a*) *Churchwardens of St. John's, Margate,* v. *Parishioners, &c., of same Parish,* 1 Hagg. C. R. 198.

(*b*) 3 Hagg. Ecc. 10.

(*c*) That such a clause is unnecessary for the protection of the parishioners, see *Jay* v. *Webb,* 1 Hagg. Ecc. 10.

remain in its place unperformed on; and not being essential to divine service, I think there is no duty or authority in the ordinary to compel the parishioners to contribute." And again: "A ring of bells cannot be provided for without expense, as for ropes, tuning, &c. Suppose at one time the parishioners are willing to take upon themselves such expenses, and at another time refuse, the ordinary could not compel the parishioners to keep the bells in order because they are in the steeple. There must be a bell to ring to church, and to toll at funerals, but that is all" (*d*).

It has been already observed, that when anything has been legally added to the church, it thenceforth becomes the charge of the churchwardens to take care of it and repair it, in the same manner as other particulars belonging to the church; and if such addition, when made, be not a mere ornament, but an essential part of the church, as a seat or gallery, the duty to repair is of course imperative.

The first step then to be taken by the churchwardens upon the vestry refusing the rate, is to ascertain whether the proposed repairs are necessary or not.

If they are not necessary, the churchwardens have clearly no means of compelling the parishioners to effect them; and even if they have funds in hand, they cannot legally employ them for such repairs without the sanction of the vestry; their only safe course is either to wait until the vestry may be induced to view the matter more favourably

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(*d*) See also *The Queen* v. *The Vicar, Churchwardens, and Parishioners of St. Stephen's, Coleman Street*, 14 L. J., 34 Q. B. S. C. nom. ex parte *Le Crew*, 2 D. & L. 571, where *Patteson*, J., held that the parishioners were not bound to supply an organist, although it had been the constant usage of the parish to elect one, and a sum had been included in the church rate for his salary. And see *Butterworth and Barker* v. *Waker and Waterhouse*, 3 Burr. 1689.

or to avail themselves of the voluntary contributions of those who may be willing to afford them the requisite pecuniary assistance.

But if they are necessary, it is submitted that the churchwardens still have power by law, however inexpedient it may be to attempt to resort to it, to compel the parishioners to effect the repairs.

And this brings us to the consideration of the second question, namely, *the methods by which the parishioners may be compelled to effect the necessary repairs.*

Until the celebrated case of *Burder* v. *Veley and another* (*a*), an opinion was entertained by some learned persons, that if the vestry refused the rate, the churchwardens might of their own authority make it, and one of the reasons assigned in support of this opinion was, that the churchwardens were punishable in the superior court for neglect of duty, if reparations were not done, or necessaries provided, and that, therefore, if the vestry did not furnish the requisite funds, the churchwardens must have authority to levy them (*b*).

That they have, however, no such power, and that such a rate made by them is illegal and void, has been decided by the celebrated case above-mentioned of *Burder* v. *Veley and another* (*c*), affirmed in the *Exchequer Chamber*, by the unanimous opinion of the judges in *Veley and another* v. *Burder*, in error (*d*).

A distinction was however, suggested in the *Exchequer Chamber* between a rate made by the churchwardens alone, upon the refusal of the parishioners, at the time and place

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(*a*) The first *Braintree case.*
(*b*) See Ecc. Law Rep. 46.
(*c*) 12 A. & E. 233; 4 P. & D. 452, S. C.
(*d*) 12 A. & E. 265; 4 P. & D. 475, S. C.

of the vestry meeting, and a rate made by them of their own authority at any subsequent time.

The Court observed, with respect to the case of *Gaudern* v. *Silby* (*e*), which has been much relied upon by the counsel for the churchwardens, one observation that arises is, that the church rate in that case was made by the churchwardens at the same vestry meeting, which had been duly summoned, and at which it had been refused by the majority of the parishioners then present; a fact which forms a most important distinction between that and the present case. The churchwardens, in that case, required a rate at a larger sum, and a majority of the parishioners present refused it for that sum, though they were willing to grant it for a smaller; and the churchwardens nevertheless made the rate, against the consent of the majority, for the larger sum. We do not enter into the discussion whether the rate so made by the churchwardens at the parish meeting where the parishioners were then met, would have been valid or not; or how far such case may be analogous to that of the members of a corporation aggregate, who being assembled together for the purpose of choosing an officer of the corporation, the majority protest against and refuse altogether to proceed to any election; in which case they have been held to throw away their votes: and the minority, who have performed their duty by voting, have been held to represent the whole number. It is obvious, indeed, that there is a wide and substantial difference between the churchwardens alone, or the churchwardens and the minority together, making a rate at the meeting of the parishioners where the refusal takes place, and the churchwardens possessing the power of rating the

(*e*) See Johnson's *Braintree case*, p. 89.

parish by themselves at any future time, however distant. It is unnecessary, however, to discuss this point, as the facts of this case do not bring it before us. It is sufficient to say, whilst we give opinion upon it, we desire to be understood as reserving to ourselves the liberty of forming an opinion whenever the case shall occur (*a*).

But it has since been decided by the House of Lords, in the case of *Goslin* v. *Veley and Joslin*, (*b*), reversing the judgments of the Courts of *Queen's Bench* (*c*), and *Exchequer Chamber* (*d*), that a rate for the necessary repairs of the church made by the minority *de facto* of the vestry, against the consent of the majority contumaciously refusing to concur in it, is also null and void in law.

The author is induced to introduce here, as in previous editions, the temperate, dignified, and well merited censure of the late Lord *Truro* on the conduct of those who refused the rate in this case.

The noble and learned lord expressed himself as follows :—

"I cannot help thinking that the circumstance of a number of persons, no doubt respectable in their general character and position, having been so misled as to avow their determination to disobey the law, and to refuse to perform an obligation unquestionably resting upon them, is so extraordinary, that it has called forth much energy to overcome such illegal resistance to the law and duty. But I think the means by which that attempt is made, if suc-

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(*a*) See 12 A. & E. 308, 309; 4 P. & D. 498, 499. See also Mr. Gurney's *Braintree Church Rate Judgment*, pp. 13, 14, 15.

(*b*) The second *Braintree* case, 4 H. of L. Cas., 679; and see Mr. Attree's edition of the case, published by Shaw and Sons.

(*c*) *Gosling* v. *Veley and Joslin*, 7 Q. B. 406.

(*d*) *Gosling* v. *Veley and Joslin* (in error), 12 Q. B. 328; 19 L. J. Q. B. 110.

cessful, would produce public mischief much beyond that which is sought to be redressed. The subjects of this country are much too rightminded, and estimate too correctly the benefits that result from a general obedience to a law while it exists, and the enormous evil which may result from persons of the class of the ratepayers of this parish entering into an open and avowed combination to evade or defy the law, to render it probable that the evil example which has been set will be followed to much extent. But the perversion of the law, by which alone I think this rate can be supported, and the adoption by the courts of law of strained analogies and presumptions in support of an attempt to impose pecuniary burthens under any denomination, is calculated not only to bring discredit upon, and to destroy confidence in the law, but also to produce greater and more permanent evils than that which it is the object of such a course to prevent" (*e*).

Nor does there seem to be any effectual proceeding in the temporal courts whereby the churchwardens may enforce the repairs. It is true that *Tindal*, C. J., in delivering the judgment of the Court of *Exchequer Chamber* in the first *Braintree case*, says that the compelling of the performance of the obligation to repair the church has been exercised usually, though perhaps not necessarily *exclusively*, by the spiritual courts from time immemorial (*f*); but no specific method of proceeding in the temporal courts is pointed out, and it is believed that the utmost extent to which they have hitherto gone has been the granting of a *mandamus* to churchwardens to assemble a vestry meeting for the purpose of deliberating on the pro-

(*e*) See 4 H. of L. Cas. 811; and see Mr. Attree's edition of *Gosling* v. *Veley*, p. 122.
(*f*) See *ante*, p. 299.

priety of making a church rate (*a*). A *mandamus* to compel the making of a church rate has been refused on the ground that the Court cannot interpose by granting a *mandamus* on a subject purely of ecclesiastical jurisdiction (*b*); and in *Veley and Joslin* v. *Gosling* (*c*), Sir *Herbert Jenner Fust*, is reported to have said, that the courts of common law have no power to enforce the repairs, and that the only remedy is in the *Ecclesiastical Court* (*d*).

It is obvious, however, that the effect of the judgments of the Courts of *Queen's Bench* and *Exchequer Chamber* in the first *Braintree case*, and of that of the House of Lords in the second *Braintree case*, is no more than to declare that the churchwardens in the one instance, and the churchwardens and the minority of the vestry in the other, had in those cases pursued a course not authorized by law, and, consequently, that all the power with which the spiritual court is invested by law to compel the reparation of the church was left untouched by those judgments (*e*).

Two methods of proceeding in the Court *Christian* have been pointed out,—the one by interdict, which suspends the performance of ecclesiastical rites in the refractory parish—the other by excommunication against the parishioners (*f*), or rather, since 53 Geo. 3, c. 127, by a declara-

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(*a*) *R.* v. *St. Margaret's and St. John's Westminster*, 4 M. & S. 250.

(*b*) *R.* v. *St. Peter's, Thetford*, 5 T. R. 364; and see *R.* v. *The Churchwardens of St. John the Baptist, Cardiff*, 16 L. J. (M. C.) 54.

(*c*) 3 Curt. 253; 2 N. E. C. 278.

(*d*) And see the observations of *Parke*, B., to the same effect in his judgment in *Gosling* v. *Veley and Joslin*, 12 Q. B. 328; 19 L. J. (Q. B.) 110.

(*e*) See the observations of *Tindal*, C. J., in delivering the judgment of the *Exchequer Chamber* in *Veley and another* v. *Burder*, 12 A. & E. 265; 4 P. & D. 475, S. C. See also *Gurney's Braintree Judgment*, p. 21.

(*f*) See the judgment of the *Queen's Bench* in *Burder* v. *Veley*

tion of contumacy, and proceedings under the writ *de contumace capiendo.*

To the former method there might, perhaps, now be insuperable objections, for the alteration of men's opinions and feelings has deprived this remedy of its virtue (*g*) ; but the latter may, perhaps, still be found to be no inefficient means for effecting the desired purpose.

The following is the course of proceeding recommended by Mr. *Swann*, in his pamphlet on church repairs :—

" If the majority of the vestry refuse to repair the church, or to make a rate for that and other necessary purposes, the churchwardens in their presentment at the bishop's or archdeacon's visitation report the christian and surnames of those who, being a majority, refuse to make the rate.

" Or the churchwardens may, after such a refusal of the vestry to make a rate, obtain from the bishop or archdeacon, or from the *Ecclesiastical Court*, a monition to the parishioners requiring them to repair the church, or to provide a sufficient rate for that purpose. On such monition being issued, the churchwardens must call a meeting of the parishioners in vestry, for the purposes mentioned in the monition ; and if the majority of the vestry refuse to make a rate, the churchwardens must report the christian and surnames of those forming the majority who have refused to make the rate.

" A citation may then issue from the Court against all or any of the parishioners whose christian and surnames shall have been so reported, to answer articles for not contributing towards the repairs of the church.

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and another, 12 A. & E. 233 ; 4 P. & D. 452, S. C. ; *Johnson's Braintree case*, 163. See also Archdeacon *Wilberforce's* Charge, p. 151.

(*g*) See note (*h*) ***supra.***

"Articles must be exhibited, and all the usual forms gone through to judgment, by which the *Ecclesiastical Court* may, under the authority of the Act of *circumspecte agatis* (*a*), impose a pecuniary fine, the amount being at the discretion of the Court, and may condemn the defendants in costs.

"A monition must then issue from the Court, requiring the parishioners to pay the fine, or to attend and hear on a day fixed in the monition that they, by reason of the non-payment of the fine, and in not contributing towards the repair of the church, and in not obeying the aforesaid monition, may be pronounced contumacious, or to have incurred the penalty of contumacy.

"The Court may, on the return of the citation (duly certified), either in the presence or absence of the parties cited, pronounce and declare them to be contumacious. A *significavit* of such contumacy will then be made to the Court of *Chancery*, and writs *pro contumace capiendo* issue from that Court to the sheriff of the county, and the parties may be apprehended and detained in prison until they comply with the monition (*b*).

"If the parties cited refuse or neglect to appear to answer articles according to the citation, they may be pronounced guilty of contumacy for not obeying the citation, and may be imprisoned and detained until they have purged the contempt" (*c*).

(*a*) 13 Edw. 1, stat. 4.

(*b*) But *quære*, whether the proper, if not the only method of proceeding now, would not be by *sequestration*, against the real and personal estate, under 2 & 3 Will. 4, c. 93, except where a temporary imprisonment is sought to be enforced under the provisions of "The Debtors' Act, 1869," *vide supra*, pp. 297, 298.

(*c*) See *Swann's* Church Repairs, 70, 71; see also *Greenwood and Spedding* v. *Greaves and others*, 4 Hagg. 77; *Veley* v.

These proceedings above set forth are to be directed against individual parishioners, but similar proceedings are pointed out by Mr. *Swann* to be taken against the parishioners at large for not repairing the church (*d*) ; there does not, however, seem to be in any readily accessable record any form of the proceedings against the body of the parishioners (*e*), and it may, therefore, be advisable to adopt the former course.

The correctness of the course recommended by Mr. *Swann* has, in great part, been verified by judicial authority, since the publication of his valuable pamphlet.

Several instances have recently occurred in which the churchwardens have been obliged, in consequence of the factious and unprincipled determination of the majority of the parishioners not to grant the necessary rates, to apply to the *Ecclesiastical Courts* for monitions to compel them to repair their parish churches.

This was done in the *Headcorne case* (*f*), the second *Braintree case* (*g*), the *Bradford case* (*h*) and the *Norwich case* (*i*).

In the *Headcorne case*, the earliest of these cases, the monition was obtained in the Arches Court (*k*), at the suit

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Burder, 12 A. & E. 265 ; 4 P. & D. 475, S. C. ; *Gurney's Braintree case*, 21 ; *Veley and Joslin* v. *Gosling*, Consist. and Arches, 3 Curt. 253 ; Consist. 1 N. E. C. 457 ; Arches 2 N. E. C. 278 ; *R.* v. *Thomas*, 2 Q. B. 589 ; and Archdeacon *Wilberforce's* Charge, p. 15.

(*d*) *Swann's* "Church Repairs," 77, 78.

(*e*) *Id.* 70.

(*f*) *Fielden* v. *Standen and Cook*, 2 Curt. 663.

(*g*) *Scale* v. *Veley and Joslin*, 1 N. E. C. 170 ; *Veley and Joslin* v. *Gosling*, 3 Curt. 253 ; 1 N. E. C. 457 ; 2 N. E. C, 278.

(*h*) See *Dale* v. *Pollard and others*, 10 Q. B. 504.

(*i*) See *Steward* v. *Francis*, post, p. 316. And see 3 Curt. 201 ; 2 N. E. C. 131.

(*k*) The proceedings were taken in the *Arches Court*, by virtue of letters of request from the inferior court.

of the vicar of the parish, against the churchwardens and parishioners, the churchwardens being *pro formâ* made defendants with the parishioners, though personally ready to discharge their duty.

The following is a statement of the proceedings:—

A decree issued from the Court, founded on an affidavit by the vicar, setting forth that the church was out of repair, and that the rates had been repeatedly refused. The decree called upon the churchwardens in special, and the parishioners in general, to show cause why a monition should not be granted to the churchwardens, to take the proper steps to put the church into repair, and to call a vestry for a certain day for the purpose of making a rate, and to the parishioners to attend and make such rate. The decree was served on the churchwardens and on some of the parishioners personally, and also by affixing the same on the outer door of the parish church. The churchwardens appeared to the decree and declared their readiness to submit themselves to the lawful commands of the Court; but no appearance was given on the part of the parishioners. A monition then issued to the churchwardens and the parishioners to the effect of the decree, and specifying the time and place at which the vestry were to meet (*a*). A vestry was duly convened, in obedience to the monition, at which the rate was contumaciously refused. The churchwardens thereupon, having no funds in hand, and not being bound to expend their own money

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(*a*) Dr. *Haggard*, in moving for the monition, relied on the authority of *Harrington and Stone* v. *Franklin* (Consist. London, A.D. 1731), in which Dr. *Henchman*, the then judge of that court, granted a monition for a parish to meet and make a church rate. The case is reported in Archdeacon *Hale's* "Precedents in Causes of Office against Churchwardens," p. 67.

or incur personal liability (*b*), declined taking any further proceedings (*c*).

In the second *Braintree case* (*d*), which was in the *Consistory Court* of London, the monition was also obtained at the suit of the vicar, the proceedings being in all respects similar to those in the *Headcorne case* (*e*), and the majority of the vestry in like manner disobeying the monition and contumaciously refusing the rate.

In the *Bradford* and *Norwich cases* the monitions in like manner issued against the churchwardens and the parishioners jointly;—in the former case, at the suit of a parishioner of Bradford, in the latter, by virtue of the office and authority of the archdeacon of Norwich.

In each instance the monition was disregarded, and the rate refused by the parishioners.

In the *Braintree case*, upon the refusal of the necessary rate by the majority of the vestry, the minority then present, made and signed a rate, which the churchwardens forthwith proceeded to enforce; but which, as we have already shown, has been pronounced invalid by the House of Lords (*f*). A similar course was adopted by the churchwardens in the *Bradford case* (*g*).

It having been determined in these cases to endeavour

(*b*) See *Lord Maynard* v. *Brand*, 3 Phill. 501; *Northwaite* v. *Bennett*, 2 C. & M., 316; 4 Tyr. 236, S. C.

(*c*) See 1 N. E. C. 172.

(*d*) *Scale* v. *Veley and Joslin*, 1 N. E. C. 170.

(*e*) A fixed day, hour, and place were named in the monition, on the authority of the *Headcorne case;* but Dr. *Lushington* seemed, at the same time, to entertain some doubts as to the propriety of this course, and to think that, under all circumstances, it would have been a safer proceeding to call on the churchwardens to summon a vestry at a *convenient time and place.*

(*f*) *Ante*, p. 308.

(*g*) See *Dale* v. *Pollard and others*, 10 Q. B. 504.

to enforce the rates made by the minorities of the respective vestries, the churchwardens could scarcely be expected, whilst the question as to the validity of these rates was pending, to proceed criminally against the parishioners who refused them; if, indeed, the rates had been valid, it may be doubtful whether they could successfully or legally have done so, for in such case, as it seems, the parishioners who refused the rate would not have been guilty of any ecclesiastical offence (*a*).

But in the *Norwich case* a different course was adopted. It was not sought in that case to enforce a rate made by the minority of the vestry, but to punish the refractory parishioners by ecclesiastical censures; and criminal proceedings were accordingly instituted against one of the parties in the *Court of Arches*, by virtue of letters of request from the *Consistorial Court* of Norwich. The citation called upon John Francis a parishioner of the parish of St. George Colegate, Norwich, to appear and answer articles "for having wilfully and contumaciously obstructed, or at least refused to make, or join or concur in the making of, a sufficient rate or assessment, for providing funds in order to defray the expense of the necessary repairs of the church." The defendant appeared under protest, and contended that the citation did not disclose any ecclesiastical offence: but Sir *Herbert Jenner Fust* overruled the protest, and assigned him to appear absolutely (*b*).

A prohibition was indeed subsequently obtained from the Court of *Queen's Bench* to prohibit the Court *Christian* from proceeding with the suit (*c*); but the judgment of the temporal court, far from denying the right of the *Eccle-*

(*a*) See *post*, p. 317; and see *Cooper* v. *Wickham*, Curt, 303.
(*b*) *Steward* v. *Francis*, 3 Curt. 201; 2 N. E. C. 131, S. C.
(*c*) *Francis* v. *Steward*, 5 Q. B. 984.

siastical Court to punish the refractory parishioner, expressly recognizes such right; and the prohibition issued upon the ground that the citation was not sufficiently explicit, and did not sufficiently show a refusal or obstruction of the rate, under circumstances which were necessarily inexcusable: the Court said that it clearly was not sufficient to allege a refusal, and that the mere addition of the words "wilfully and contumaciously obstructing," without showing *how*, did not supply the omission.

It had, indeed, been previously decided that criminal proceedings could not be sustained against a parishioner for refusing to repair his parish church, unless it appeared that the conduct of the parishioner was wilful and contumacious, and also that the church remained in need of repair in consequence of such refusal; and therefore that it was no ecclesiastical offence, even in a churchwarden, to vote at a vestry meeting convened for the purpose of making a church rate, in favour of a resolution condemnatory of church rates and against a rate, however indecent, improper, and obnoxious such a course might be, unless it appeared that in consequence of the resolution being carried, and of the rate being refused, the church became dilapidated (*d*).

If the churchwardens neglect or refuse to discharge the duties which the law imposes upon them in respect of church rates, they may be compelled to do so by ecclesiastical censures, and the Court *Christian* has adequate authority to punish any neglect of duty committed to their charge (*e*); but in order to render them

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(*d*) *Cooper* v. *Wickham*, 2 Curt. 303; and see *Greenwood and Spedding* v. *Greaves and others*, 4 Hagg. 71; *Miller and Simes* v. *Palmer and Kilby*, 1 Curt. 504.

(*e*) *Lord Maynard* v. *Brand*, 3 Phil. 501; *Miller and Simes* v. *Palmer and Kilby*, 1 Curt. 504.

liable to *criminal* proceedings in the *Ecclesiastical Court*, it must be shown that they are personally to blame, and have been guilty of wilful disobedience; and if to a monition calling upon the churchwardens to repair the church they should return that they had called a vestry, and that such vestry had refused a rate, so far it seems the churchwardens would be exempted, for nothing is more clear that they are not bound, and that it is illegal in them to expend their money or to incur debt (*a*).

If no fault is ascribed personally to the churchwardens, but a question arises as to the propriety of the repairs, or if the churchwardens do, or are willing to do their duty, but obstacles out of the power intervene, then the proper mode of proceeding is in the *civil* form (*b*).

The churchwardens may be compelled by *mandamus* to call a vestry meeting for the purpose of deliberating on the propriety of making a church rate; for although the Court will not interfere by *mandamus* to compel the churchwardens, &c., to make a church rate, which is properly of ecclesiastical cognizance (*c*), yet they will put in motion their functions in *ordine ad*, *i.e.*, to assemble in order to inquire and agree whether it be fit that a rate should be made (*d*).

And where a rate has been duly made by the parish, and there is a *custom* for a particular chapelry or township to contribute a given proportion of the whole rate,

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(*a*) *Lord Maynard* v. *Brand*, 3 Phill. 501; *Miller and Simes* v. *Palmer and Kilby*, 1 Curt 540; and see *Northwaite* v. *Bennett*, 4 Tyr. 236; 2 C. & M. 315, S. C.

(*b*) Per Cur. in *Miller and Simes* v. *Palmer and Kilby*, 1 Curt. 540. But see *supra*, p. 311, *et seq.* for the proper course to be adopted in such case.

(*c*) *R.* v. *Thetford, Inhabitants of*, 5 T. R.

(*d*) Per Cur. in *R.* v. *Churchwardens and Overseers of St. Margaret and St. John, Westminster*, 4 M. & S. 250.

mandamus will lie to the chapelwardens to assess and levy the quota payable by such chapelry or township (*e*). But in order to maintain the *mandamus* the quota to be contributed by such chapelry or township must be shown (*f*), and it must appear that the inhabitants of such chapelry or township were duly summoned to the vestry at which the rate was made, for a custom to contribute to a church rate without being summoned to the vestry cannot be sustained (*g*).

Before the passing of the 6 & 7 Vict. c. 67, the Court would not, however, as it seems, grant the writ in cases of doubt and difficulty, where the granting it would, in all probability, have involved the parties to whom it was directed in trouble and litigation (*h*). It certainly would not do so, where a Court of competent jurisdiction had already decided the point against the view of the parties applying for the writ, although a contrary opinion might have been expressed by a superior tribunal, and the application was made for the express purpose of enforcing proceedings, with a view of finally deciding the question; and therefore the Court of *Queen's Bench* refused a *mandamus* to compel the collection of a customary portion of a

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(*e*) *Stead* v. *Heaton*, 4 T. R. 669; *R.* v. *Chapelwardens of Haworth*, 12 East, 556; *R.* v. *Dalby*, 3 Q. B. 602; and *semble*, that in such case the proceedings must be by *mandamus*, and not in the *Ecclesiastical Court*, for the *custom* draws the jurisdiction to the temporal tribunal. But *quære* whether the Court would grant a *mandamus* since "The Compulsory Church Rate Abolition Act, 1868," except in cases where the payment of the rate may still be enforced. They certainly would not do more than command them to assess and *endeavour to collect*, nor would they grant one at all against the wardens of a chapelry or other ecclesiastical district having a consecrated church. See 31 & 32 Vict. c. 109, s. 6, *ante*, p. 89.

(*f*) *R.* v. *Pickles and Anderson*, 3 Q. B. 599.

(*g*) *R.* v. *Dalby*, 3 Q. B. 603.

(*h*) *R.* v. *Sillifant*, 4 A. & E. 354; 5 N. & M. 640, S. C.; *R.* v. *Thomas and another*, 3 Q. B. 582.

church rate made by the minority of the vestry upon the refusal of the majority to make it, after the decision of Dr. *Lushington* against the validity of such a rate in *Veley and Joslin* v. *Gosling* (*a*), notwithstanding the intimation in favour of its validity thrown out by the judges of the *Exchequer Chamber* in *Veley* v. *Burder* (*b*), and the fact that the vestry meeting at which the rate was made was held in obedience to a monition, from the *Ecclesiastical Court* for the express purpose of making the rate (*c*).

But it is now provided by the above-named statute, 6 & 7 Vict. c. 67, that writs of error may be sued out and prosecuted upon the proceedings on writs of *mandamus* (*d*), and that no action, suit, or any other proceeding shall be commenced or prosecuted against any person for or by reason of anything done in obedience to any peremptory writ of *mandamus* (*e*); provisions which have in great measure, if not altogether, removed the objection to the interference of the Court by *mandamus* in cases of doubt and difficulty.

Again, although the Court of *Queen's Bench* will not grant a *mandamus* to compel the making of a church rate at common law, such rate being purely and exclusively of ecclesiastical cognizance, yet where the rate is created by Act of parliament, and differs in any respect from a common law rate, either as to the purposes for which it is

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(*a*) 3 Curt. 253; 1 N. E. C. 457, S. C., a decision which was afterwards upheld by the House of Lords. Vide *supra*, p. 308.

(*b*) 12 A. & E. 233; 4 P. & D. 452; S. C. Vide *supra*, p. 306.

(*c*) *R.* v. *Thomas and another*, 3 Q. B. 589. This case was before the decision of Sir *Herbert Jenner Fust* in favour of such a rate in *Veley and Joslin* v. *Gosling*, 3 Curt. 304; 2 N. E. C. 278, S. C.; and that of the Court of *Queen's Bench* in *Gosling* v. *Veley and another*, 7 Q. B. 406.

(*d*) See sect. 2.

(*e*) Sect. 3.

directed to be made, or the parties by whom it is to be made, or the manner in which it is to be made, disputed, or enforced, there the temporal courts have jurisdiction and *mandamus* lies.

Therefore, where money has been lent before the passing of "The Compulsory Church Rate Abolition Act, 1868," (*f*) upon the credit of church rates, under the Church Building Acts, or under the provisions of 5 Geo. 4, c. 36, it is a temporal debt, and the making of a rate to pay such debt not being a matter of ecclesiastical cognizance, a *mandamus* will issue to compel its being made (*g*): and as the churchwardens in the one case, and the churchwardens and overseers of the poor in the other case (*h*), are themselves *required* to make the rate, it will lie against *them*, and a return that the vestry have refused the rate is bad (*i*).

So, where a statute exempted parishioners from paying tithe, and enacted that in consideration thereof it should be lawful for the churchwardens for the time being and the overseers, giving notice to, or calling together six or more of the inhabitants having certain qualifications to assemble yearly in vestry, and make a rate, out of which the churchwardens were to pay certain salaries to the chaplain, schoolmaster, and usher of the parish, in lieu of all moneys theretofore payable to them out of the tithes of the parish by virtue of a charter of King James the First, applying all the residue of the moneys so to be raised to repairs of the church and other church affairs as they should think meet, and a subsequent statute provided that the rate should be made by the vestry, and confirmed by two

(*f*) 31 & 32 Vict. c.109.
(*g*) *R.* v. *Churchwardens of St. Mary, Lambeth*, 3 B. & Ad. 651.
(*h*) 5 Geo. 4, c. 36.
(*i*) *R* v. *Churchwardens of St. Mary, Lambeth*, supra.

justices—the vestry, having refused to make a necessary rate for payment of the salaries and repair of the church, were compelled to do so by *mandamus* (*a*).

The *mandamus* must, of course, in every such case be directed to the parties who are appointed by the particular Act to make the rate.

In applying for the *mandamus* in all these cases care must be taken to bring all necessary materials before the court at once, for it is a general rule that a second application with fresh materials, but upon the same state of facts, will not be allowed; and this rule applies not only to cases where the parties applying for the *mandamus* are private individuals, but also to those cases where the parties applying are churchwardens or other public officers, acting in the discharge of a public duty (*b*).

Any attempt to excite resistance to the payment of church rates, or to render odious those who collect them, is illegal (*c*); and if two or more persons combine together to defeat the ends of justice, by preventing the lawful levying of church rates, they may be indicted for a conspiracy (*d*).

(*a*) *R.* v. *St. Saviour's, Southwark*, 7 A. & E. 925. It was argued in this case, that *mandamus* could not go, as the rate was in lieu of tithes, which were exclusively of ecclesiastical jurisdiction; but the Court said that the provision for the allowance of the rate by two justices clearly prevented it from being a matter of ecclesiastical cognizance. See 7 A. & E. 936, note (*a*). It is presumed that without this provision the *mandamus* would equally have gone to enforce the making of this statutable rate. See further on this subject, Rog. Eccl. Law, 994, 995; *R.* v. *St. Margaret, Leicester*, 8 A. & E. 889; and *Hopkinson* v. *Puncher*, 3 Exch. 95. See a subsequent case on the construction of these local statutes, and of the 5th section of "The Compulsory Church Rate Abolition Act, 1868." Ex parte *Stafford*, supra p. 93.

(*b*) *R.* v. *Pickles and Anderson*, 3 Q. B. 599; 3 G. & E. 485, S. C. As to the necessity for the application for the *mandamus* and the affidavit upon which it is made respectively, being made by some person who has an interest in the result, vide *supra*.

(*c*) *Bond* v. *Douglas*, 7 C. & P. 626.

(*d*) *R.* v. *Murphy*, 8 C. & P. 297.

CHAPTER IV.

ON THE FURTHER DUTIES OF CHURCHWARDENS WITH RESPECT TO THE CHURCH, CHURCHYARD, CHURCH GOODS, ETC.

SECTION I.

On the Duties of the Churchwardens with respect to the Seats in the Church.

As the churchwardens have the care of the church, so also have they of all the seats therein; and not only to repair them, but also to see that good order be preserved in them, and no disturbance or contention be made about them in the house of God; but that every man regularly take that seat, and that place in it which he hath a right to, whether it be by prescription, or that he hath been placed there by the order of the bishop, or by themselves (*e*).

For if the lord of the manor or any other gentleman of the parish, having an estate and ancient messuage therein, have immemorially, they and their ancestors, sat in an aisle of a church, buried their dead there, and always repaired the same, they can prescribe to the said aisle, and cannot be dispossessed of it, either by the churchwardens, the minister, or the ordinary, but will have their action if disturbed therein. For such an immemorial pos-

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(*e*) Prid. 102, 103; and see *Reynolds* v. *Monkton*, 2 M. & R. 384; *Burton* v. *Henson*, 10 M. & W. 105.

session will carry with it a presumption that the aisle was first built by the founder of it, with the consent of the minister, patron, and ordinary, with intent to have it solely to himself (*a*).

And upon the same reason, should any gentleman having a house in the parish, by the like consent of the minister, patron, and ordinary, build a new aisle, and have a faculty from the bishop to hold the same to the use of him and his family, to bury their dead in the said aisle, and also to sit there for the hearing of divine service, on condition constantly to repair it, this faculty would give him a good title to the said aisle. But no such title can be good, either upon prescription, or any new grant by a faculty as aforesaid, to a man and his heirs; but the said aisle must always be supposed to be held in respect of the house, and therefore it must always go with the house to him that inhabits it, whether he be the heir or else some other occupant, who hath it by assignment from him. (*b*).

(*a*) Prid. 104; *Corven* v. *Pym*, 12 Coke, 195; 3 Inst. 202; *Francis* v. *Ley*, Cro. Jac. 366; *Dawney* v. *Dee*, Bridgeman, 4 Cro. Jac. 605; *Buxton* v. *Bateman*, Sir T. Raym. 52; 1 Sid. 88, 201; 1 Lev. 71; *Churton* v. *Frewin*, 35 L. J. Ch. 692; 1 Ch. (L. R.) 634, and in such case the freehold in the aisle, and not merely the right to use it, may be vested in him. *Churton* v. *Frewin*, supra; although the aisle be under the same roof as the body of the church, and form an integral part of such church, see *Chapman* v. *Jones*, 4 Ex. (L. R.) 278, *ante*, p. 72, where the reference is erroneously made to the Equity Cases instead of the Exchequer Reports.

(*b*) Prid. 104, 105, 106. The language of Dr. Prideaux has been preserved here, as in former editions of this work, but it is apprehended that in order to annex a pew to a house the faculty must, in express terms, or by reasonable intendment show an intention so to do. That a faculty to a man and his family, and a faculty annexing a pew to a house are totally distinct, is evident from the language of Sir *John Nicholl* in *Fuller* v. *Lane*, 2 Add. 472 (see this case in the Appendix, p. liii.), and in *Partington* v. *The Rector of Barnes*, 2 Lee, 345. See also *Bull* v.

And in like manner, may the lord of the manor or any other inhabitant of the parish dwelling in an ancient messuage within the same, prescribe to a seat in the body of the church as appurtenant to such ancient messuage, which he and his ancestors have been immemorially possessed of, and have always repaired at their own cost and charge (*c*).

And in like manner, may an inhabitant, in respect to his house, prescribe to first, second or third place in the same seat, which hath immemorially been repaired by him and the rest that jointly sit with him in it. But this right cannot go to their heirs, but is annexed to their houses, and must always go with them in the same manner as the right of an aisle above mentioned (*d*).

As to all other seats in the body of the church, which are repaired at the charges of the parish, they are in the disposal of the churchwardens with the advice of the minister, but still in subordination to the bishop, who hath the primary right of disposing and ordering of this matter in every church of the diocese. For he having there the primary cure of the souls of the people, and the chief government and direction of all matters relating to order and decency, is presumed by law to be the properest person

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Jones, 2 Hagg. 417. It is rather conceived that a faculty to a man and his family is personal to the *grantee* and *his household*, to the exclusion alike of his posterity and of the future occupiers of his house, but that the privilege would not be lost by a change of residence, so long as he continued to reside in the parish.

(*c*) Prid. 106. That a pew in the *chancel* may also be appurtenant to a house in the parish, see *Parker* v. *Leach*, 4 Moore, P. C. (N.S.) 530; 1 P. C. (L. R.) 30.

(*d*) Prid. 106; that the right to pews and seats annexed to messuages cannot be severed from the occupancy of the messuages, see *Byerly* v. *Windus*, 5 B. & C. 1. In re *the Cathedral Church of St. Columb, Londonderry*, 8 L. T. (N.S.) 861; *Walter* v. *Gunner and Drury*, 1 Hagg. Con. 317.

to be entrusted with the judging of the different qualities and degrees of the people, in order to the placing them in the church, each according to his rank, so that there be no contention there about this matter. And, therefore, if any think that justice is not done him in the seat assigned him by the churchwardens, he may apply to the bishop for remedy whose determination is final in this matter unless an appeal be made to the archbishop. For the common law has nothing to do with those seats to which no prescription is claimed; and therefore, all these remain under the ordering of the bishop, which he may either leave to be disposed of by the churchwardens, with the advice of the minister, as is for the most part practised, especially in London, or else dispose of them himself; and when he doth this latter, it is by an instrument called a faculty (*a*).

If the faculty be to a man and his family, and the owners and occupiers of a certain dwelling-house, to occupy a pew, and the house is subsequently divided, all the occupiers

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(*a*) Prid. 106, *et seq. Cowen's case,* 12 Rep. 105; Com. Dig. Esglise (93). Prohibition (G.) (G. 3); *Pawson* v. *Scott,* Sayer, 176; *Reynolds* v. *Monkton,* 2 M. & R. 384; *Burton* v. *Henson,* 10 M. & W. 105. The words "with the advice of the minister" have been retained in the above extract from Dr. *Prideaux's* work; but it must be borne in mind that in strictness neither the minister nor the vestry has any right to interfere, although the advice of the minister, and even sometimes the opinions and wishes of the vestry, may fitly be invoked, and to a certain extent reasonably deferred to by the churchwardens. See the judgment of Sir *John Nicholl* in *Fuller* v. *Lane,* 2 Addams, 419, set out at length in the Appendix see p. liii. And that the vestry have no right to interfere, see further *Spry* v. *Flood,* 2 Curt. 533. That the ordinary himself cannot interfere with a faculty seat, though for the benefit of the parish, see *Knapp* v. *The Parishioners of St. Mary, Willesden,* 2 Roberts, 358; and if he proceed to try the right to a pew by prescription, a prohibition may be obtained from either of the courts of common law; or in vacation from the Court of Chancery. See In re *Bateman,* Eq. Cas. (L. R.) 670.

have a right to the use of the pew ; and if there be any dispute, they must settle it among themselves, for the churchwardens, who derive their authority from the ordinary, have no right to interfere (*b*).

But it must be taken notice of, that how much soever it may have been the usage in any place for the churchwardens to dispose of the seats in the church, it can never amount to a prescription to exclude the bishop ; because they being officers under him, whatsoever they do in this kind must always be supposed to be done by an authority derived from him, either positively granted, as by his faculty, or else tacitly allowed. And this must hold in London, as well as everywhere else. For although in that city the churchwardens take it wholly upon them to dispose of seats, yet no usage can give them a title to do this exclusive of the bishop. For when any controversy ariseth, they have nowhere else to go, but to the bishop, for a decision of it. The common law never meddles with this matter but where a seat is claimed by prescription. All other seats it wholly leaves to the disposing and ordering of the bishop ; and as long as he hath the decision of all controversies about them, this will always be a proof of his right in this matter ; and, therefore, whatsoever usage the churchwardens may pretend to in any church for the disposal of the seats in it, they must be understood to do this solely by the authority of the bishop, as officers under him, not by any of their own (*c*).

It should be mentioned here that the right of the church-

(*b*) *Harris* v. *Drew*, 2 B. & Ad. 164.

(*c*) Prid, 113, 114. That there can be no prescription to dispose of seats independently of the ordinary, see *Presgrave* v. *The Churchwardens of Shrewsbury*, 1 Salk. 167 ; and see *May* v. *Gilbert*, 2 Bulst. 151.

wardens to the regulation of the pews in a parish church, subject to the control of the ordinary, extends even to the case of a parish church which is also a cathedral (*a*). But where the cathedral is not a parish church, *semble*, there can be no allocation of seats, unless by the bishop (*a*).

It should be further mentioned that although every parishioner has a right to be seated, he has not a right to a pew, and that persons not being parishioners have no right to a pew or sitting (*a*).

But whether the seats in the church be repaired by the parish in general, or by such particular persons who prescribe to them, care is to be taken that they be not so built as to be a hindrance to the divine service, or to any particular persons from partaking of the benefit of it, or by any other way obstructive of the good order of the church. And, therefore, if any seat be built so high as to hinder those that sit behind from well hearing the minister, or the churchwardens from well observing the behaviour of those that sit in them (which they are bound to prevent if there be anything amiss in it), on complaint made to the ordinary this is to be remedied, and the seat taken down to such a height as is fitting (*b*).

Although the seats in the body of the church be fixed to the freehold, which is the minister's, yet the materials do not, therefore, become his when taken down again, but belong to his parishioners ; for they, having a right to put them there, because of the common use which they have of that part of the church, have a right to take them away

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(*a*) In re *the Cathedral Church of St. Columb, Londonderry*, 8 L. T. (N.S.) 861.

(*b*) Prid. 115. *Gibson* v. *Wright*, Noy. 108.

again. And, therefore, when any seat in the body of the church, which is in the common repair of the parish, is pulled down, either to be new built, or for any other reason, all the materials are to go to the churchwardens for the use of the parishioners, and are to be disposed of accordingly, in the same manner as are the old materials of the roof, or any other part of the church which they are bound to maintain (*c*).

But if the seat be illegally set up by any private person, and be therefore ordered to be pulled down again, in this case the materials do certainly belong to the minister, in that they have been fixed to his freehold. The churchwardens cannot claim them for the parish, because they did not put them there ; and the private person who built the seat, having had no right to put them there, he can have no right, after having fixed them to the freehold, again to take them away ; and therefore neither he nor the churchwardens can have anything to plead in bar of that right, which the minister hath acquired to them by having had them fixed to his freehold. If a man wrongfully plants a tree in another man's soil, by putting it there he makes it part of the freehold, and therefore, whenever it is again removed, it belongs to him that owns the land, and the case before us is exactly parallel hereto (*f*).

As a lord of a manor, or any other owner of an ancient messuage, may prescribe to a seat in the body of the church, which he and his ancestors have immemorially used and repaired, to the exclusion of the bishop, so may the parson prescribe to a seat in the chancel, which he and his predecessors have immemorially been possessed of. And if

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(*c*) Prid. 116.
(*d*) *Id.* 116, 117.

not so, yet since the charge of repairing that part of the church, as well as the freehold, is in the parson, it is most reasonable he should be first provided for with a seat for his family in it. And the case is the same, whether the parson be appropriator, impropriator, or instituted rector of the parish (*a*).

The parson is indeed of common right entitled to the chief seat in the chancel, though by prescription another parishioner may have it (*b*).

In some cases also, though the parson repairs the chancel, the vicar claims a prescriptive right of a seat for his family there (*c*).

But it seems that this prescriptive right to a seat in the chancel cannot extend to a perpetual curate, for perpetual curates were at common law mere stipendiary curates, and had no vested rights till long after the time of legal memory; nor yet to the rector of a new church, who can have no prescriptive rights; but in these cases the ordinary would allot them proper pews for themselves, their families and servants (*d*).

But with respect to the seats in the chancel generally, the law has not been clearly settled, and great inconvenience has been experienced from the doubts continued to be entertained (*e*).

Some are of opinion that the churchwardens have no authority over pews in the chancel (*e*).

(*a*) Prid. 118.

(*b*) *Hall* v. *Ellis*, Noy. 153; *Clifford* v. *Wicks*, 1 B. & A. 498; *Spry* v. *Flood*, 2 Curt. 353.

(*c*) Johns. 242.

(*d*) See the observations of Dr. *Lushington* in *Spry* v. *Flood*, 2 Curt. 353.

(*e*) Eccl. Law. Rep. 49.

Again, it has been said that the rector, whether spiritual or lay, has in the first instance a right to dispose of the seats; claims have also been set up for the vicar; the extent of the ordinary's authority to remedy any undue arrangement with regard to such places has been questioned (*f*).

But the better opinion seems to be that the jurisdiction of the ordinary over the seats in the chancel is co-extensive with that which he possesses over the seats in the body of the church (*g*); and if this be so, it is apprehended that the churchwardens have under him the like power of disposing of the seats in the chancel, as of those in the body of the church.

The following extract will show the opinion of Dr. *Prideaux* upon this subject:—

"Although the bishop's right to the disposal of the seats in the body of the church be undoubted, yet there is some dispute in respect of the chancel, because the parson hath not only the freehold of it, but also repairs it. But to this it is to be replied, that the bishop's right is the same through the whole church, that is, in the chancel as well as in the body of the church. And as the parishioner's repairing the body of the church doth not exclude his right there, so neither doth the parson's repairing the chancel exclude it here; but he hath in both an equal right to dispose of all the seats in them * * * *. But if there be room for any other seats (*h*), the bishop can

(*f*) Eccl. Law. Rep. 49.

(*g*) *Clifford* v. *Wicks*, 1 B. & A. 498; *Morgan* v. *Curtis*, 3 M. & Ry. 328; Rog. Eccl. Law, 187, *post*, p. 333. In *Clifford* v. *Wicks*, *Bayley*, J. is reported to have said, "The general rule is that the rector is entitled to the principal pew in the chancel, but that the ordinary may grant permission to other persons to have pews there."

(*h*) That is, *besides the parson's*. The passage omitted is the same given above, as to the right of the parson to a seat in the chancel, *ante*, p. 329.

grant faculties for the building and disposing of them in the chancel as well as in the body of the church. Only if the bishop doth not interpose then the parson may dispose of the seats in the chancel, in the same manner as the churchwardens do those in the body of the church, because of his repairing of it; but if there doth any controversy arise, then there doth lie an appeal to the bishop from the one, as well as from the other. But as to this matter the case is very peculiar in the city of London, for there the churchwardens repairing the chancel, as well as the body of the church, do equally dispose of the seats of both. But it must be understood still with the same subordination to the bishop as in other churches" (*a*).

No arrangement for the sale of pews can be supported, for the practice of selling them is altogether illegal; they belong to the parish for the use of the inhabitants, and cannot be sold or let, except under the authority of an Act of parliament. If an occupier of a seat leaves the parish he cannot let it, nor can he dispose of it by will upon his death, but in either event, it reverts to the churchwardens (*b*). And if the churchwardens foster and abet the illegal practice of buying, selling, and letting pews, instead of preventing and extirpating it, as they are bound to do by the solemn obligation to maintain the ecclesiastical law, which they contract on their institution into their office, they will subject themselves to criminal proceedings and punishment in the Court *Christian* (*c*).

(*a*) Prid. 117, 118, 119, that a faculty to place movable seats in a chancel, which may be removed at the discretion of the ordinary, is valid, see *Eld* v. *Perry and Ward*, 11 Jur. (N.S.) 228.

(*b*) *Wyllie* v. *Mott and French*, 1 Hagg. 19; *Stevens* v. *Woodhouse, Spry* v. *Flood*, 2 Curt. 353; *Rawlinson* v. *Medwin and Hurst*, 19 L. T. 371; see also *Walter* v. *Gunner and Drury*, 1 Hag. Con. 317.

(*c*) See the judgment of Dr. *Phillimore* in *Rawlinson* v. *Med-*

It may not be amiss to remark here, that where it is in contemplation to repew the church, or to make any important alteration in pews, it is highly proper, and indeed quite necessary, that a faculty should be applied for; but it is not to be maintained that every little alteration of a pew, for the accommodation of the parishioners, requires a faculty (*d*).

The summary of the law upon this snbject by the late Mr. *Rogers* in his work on Ecclesiastical Law is so able, that no apology, it is confidently felt, will be required for setting it out in this place, although it will in some few instances involve in substance a repetition of that which has already been stated :—

"All pews in a church are *prima facie* at the disposal of the churchwardens as the parochial officers of the ordinary, except the chief seat in the chancel, which custom appropriates to the rector, whether lay or ecclesiastical, and sometimes to the vicar; for with regard to the other seats in the chancel, it seems the better opinion that their power extends to them also.

"But the ordinary has the power, by a faculty, of conferring an exclusive right to sit in a particular pew, upon the persons inhabiting a particular house within the parish: this privilege is always annexed to the house, and not to the person; it cannot, therefore, be granted to a man and his heirs, nor inasmuch as it is a privilege conferred on inhabitants, can it be conferred on a man in respect of a particular estate in a parish. Being annexed to the house, it would, it is conceived, be appurtenant to the house: it certainly

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win and Hurst, 19 L. T. 371. Under the Church Building Acts provision is made for the letting of pews on certain terms and conditions. See *post*, p. 337 *et seq.*

(*d*) See the observations of Sir *John Nicholl*, in *Parham* v. *Templar*, 3 Phill. 315.

would pass with the house if expressly transferred; and it is apportionable amongst the distinct inhabitants of the house.

"By a faculty, the right to sit in a particular pew in a private aisle (*a*), and also it seems in a public aisle (*b*), or even the body of the church, may be annexed to a house out of the parish.

"Subject to these private rights, it is the duty of the churchwardens to make all the seats as available as they can, for the accommodation of the parishioners, having regard in the arrangement to their respective stations and conditions; to enable the churchwardens to accomplish this, they may place or displace at pleasure, taking care not to exercise such power unnecessarily or capriciously (*c*).

"If any one feel aggrieved by the conduct of the churchwardens, he may cite them to show cause in the *Ecclesiastical Court* why they have so seated him, or omitted to seat him.

(*a*) See *Davies* v. *Witts*, Forest, 14.

(*b*) It is conceived that such right in a public aisle, or in the body of the church, cannot be granted by a *faculty;* but it may exist by *prescription,* for the house may originally have been within the ecclesiastical district belonging to the church. See *Lousley* v. *Hayward*, 1 Y. & J. 583; *Byerley* v. *Windus*, 5 B. & C. 1. This point was raised but not decided, in *Hallack* v. *The University of Cambridge*, 1 Q. B. 593; 1 G. & D. 100, S. C. It should, however, be mentioned that in the case of In re *the Cathedral Church of St. Columb, Londonderry*, 8 L. T. C. P. 861, in the Diocesan Court of *Londonderry*, Dr. *Todd*, the vicar-general of the diocese, expressed great doubt as to the correctness of the law on this point as laid down in *Lousley* v. *Hayward.* He is reported to have said, "I think as regards a pew in the body of a parish church the right thereto ceases no matter how created, or how long it had existed, the moment the occupier ceases to be a parishioner, whether by leaving the parish or the parish leaving him."

(*c*) That the churchwardens will not, however, be justified in dispossessing a parishioner of a seat which he has enjoyed for a time,

"If a man be placed in a particular pew by the churchwardens, or sits there by their acquiescence, and is disturbed by another in the use of it, he may sue such person in the *Ecclesiastical Court*, in a suit called '*perturbation of seat*,' and his possessory right is sufficient to maintain such suit against a mere disturber; but such right will not support a suit for perturbation of seat against the churchwardens themselves; for, as he sat there originally by their leave, express or implied, they may revoke such leave, and displace him, whenever the demand for such accommodation requires them to exercise that power.

"If, however, a man have an exclusive right to sit in a particular pew, in right of his inhabiting a dwelling-house, to which it has been annexed by a faculty, he may maintain a suit for perturbation in the *Ecclesiastical Court* against even the churchwarden, and *a fortiori* against a disturber and stranger.

"So also he may have an action on the case at common law, for disturbing him in the use of the pew, either against the churchwardens or against a disturber and stranger.

"In order to support such right, either in the one court or the other, he must give in evidence the faculty which annexed the pew to the house which he inhabits, or else such evidence of user, repairs, or other circumstances, as are

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without giving notice of their intention, and offering an opportunity for objection and explanation, see *Horsfall* v. *Holland and Woolley*, 6 Jur. (N.S.) 218, and see *Brabin* v. *Tredeman*, 2 Roll. Rep. 24, cited *arguendo* in *Jones* v. *Ellis*, 2 Y. & J. 270. It may be mentioned here that in the recent case in the Court of *Arches* of *Craig* v. *Watson and another*, M. T. 1871, Sir *Robert Phillimore* intimated to the churchwardens the propriety of seating a man and his family *together* in a convenient place. See the report of the case in the "Times" newspaper for January 28, 1871.

usually proved in support of prescriptive rights; so as reasonably to lead a judge in the *Ecclesiastical Court*, or a jury in a court of law, to the conclusion, that the right, thus immemorially exercised by him and his predecessors, was originally derived from a faculty.

"In the *Ecclesiastical Court* such a right has never been presumed upon mere user alone; and although mere user, if long continued, has been left to a jury as evidence upon which they might, even taken alone, presume a faculty, yet it would seem that mere user of a pew, from the very mode in which pews are allotted or occupied, is of so equivocal a character, that of itself, and without any circumstances to give it the character of user adverse to the churchwardens, it is hardly a sufficient ground to presume such grant" (*a*).

It may be mentioned here that in some local Acts of parliament for pulling down and rebuilding parish churches authority is given to the trustees to convey certain pews to certain persons, their heirs and assigns. The effect of such a conveyance must of course depend upon the language of the particular Act, to be collected from a careful review of the whole of it. In *Hinde*, appellant, *Charlton*, respondent (*b*), it was held that the effect of the conveyance was simply to confer the right to use the pew for the purposes of divine service, and that very conclusive language would be required in such a case to give the

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(*a*) Rog. Eccl. Law, 171, 172. For further information on the subject of pews see the judgment of Sir *John Nicholl*, in *Fuller* v. *Lane*, 2 Add. 427. This judgment, which is in itself a treatise on the law of pews, is set out in the Appendix, see p. liii. See also the elaborate judgment of the *King's Bench* in *Byerley* v. *Windus*, 5 B. & C. 1.

(*b*) 2 C. P. (L. R.) 104.

conveyance the effect of vesting the freehold of the pew in the grantee (*c*).

It has already been stated, that under the various Church Building Acts, the letting of seats is authorized. The duty of receiving and appropriating the pew rents devolves, by the express language of the various Church Building Acts, upon the churchwardens and chapelwardens of the respective churches and chapels built and appropriated under those Acts.

The following are among the most important of the sections in the Church Building Acts relative to the pews and seats.

58 Geo. 3, c. 45, s. 75 : Before consecration of any church or chapel under this Act, a seat or pew, sufficient to hold six persons at least, shall be set aside in the body or ground floor of the church or chapel, near the pulpit, for the use of the minister and his family ; and other seats, not among the free seats, for not less than four persons, for the minister's servants.

Section 63 : Commissioners may make orders as to the amount of rents for pews or seats ; and the produce thereof shall form a fund out of which provision shall be made for the minister and clerk.

Section 76 : All subscribers, being parishioners, to any church or chapel, built under this Act, shall have choice of pews at the rates fixed by the commissioners, in the order of their amount of subscription, and all subscribers of the same amount in the order of their subscription.

Section 77 : The pews or seats to be charged with the yearly rents set opposite the figures or numbers marked

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(*c*) And see *Bumfit* v. *Roberts*, 5 C. P. (L. R.) 224; *Greenway* v. *Hockin*. *Ibid*. 225.

upon them in a list or schedule, to be made and signed by the commissioners, and annexed to the deed of consecration : such rents to be paid by the possessors or occupiers of the pews or seats by two equal half-yearly payments in each year, on the Monday after the 25th of December, and on the 25th of June, in the vestry room, between nine in the morning and four in the afternoon.

Section 78 : The churchwardens, with the consent in writing of the incumbent, patron, and bishop, may alter such pew rents ; and a new list or schedule of rents, and the pews or seats on which they are charged, shall be signed by the churchwardens, incumbent, patron, and bishop, and deposited with the deed of the consecration.

Section 79 : If the rent of any seat or pew shall be unpaid for three months, and notice in writing demanding payment thereof shall have been given to the owner or occupier, the churchwardens may either enter upon and hold such seat or pew, or let the same to any other person, till the rent in arrear and all costs shall be paid ; or otherwise sell the same pews or seats by auction to the best bidder, and out of the money thence arising pay the rent in arrear, with the costs, rendering the overplus to the owner or occupier ; or they may recover the rent in arrear by action for use and occupation against the owner or occupier.

Section 73 authorizes and empowers the churchwardens, in case of non-payment of the rents of the seats and pews, to enter upon and sell the same, or else to sue for and recover the same by action, and sue for such rents in the names of "The churchwardens of the church or chapel of ——" (describing the same) ; and no such action is to abate by reason of the death, or removal, or going out of office of any such churchwardens.

59 Geo. 3, c. 134, s. 32 : The pew rents shall be payable

in advance; *i.e.*—one year's rent shall be paid on the admission to the pew or seat, if given at Lady Day or Michaelmas, or if at any intermediate period, then the proportion of the half year to Lady Day or Michaelmas, and a half year's rent above such proportion; and thereafter a half yearly payment shall be made in advance, commencing at Lady Day or Michaelmas following the taking; and every such pew or seat shall be forfeited and become vacant by discontinuing any such payment in advance for two following half years.

3 Geo. 4, c. 72, s. 24: In every case in which pew rents shall be fixed under the provisions of this and the former Church Building Acts, notice shall be given for six successive weeks, at the end of each year, of all the pews vacant, or which shall become vacant at the commencement of the next year, by writing affixed on the doors of the church or chapel, and vestry room, and all pews not taken at the rents fixed within fourteen days after the commencement of the ensuing year shall be let to any inhabitant of any adjoining parish or place in the churches or chapels of which there shall not be sufficient accommodation for the inhabitants thereof, at the rent fixed upon such pews for any term not exceeding the end of the year, when such pews shall be again let, in manner aforesaid, and so from year to year.

1 & 2 Will. 4, c. 38, s. 4: The pews or sittings in every church or chapel, built or appropriated under this Act, shall be let by the churchwardens or chapelwardens, or by some person appointed by the trustees, or person or persons building and endowing the same, to act in that behalf, according to a scale of pew rents fixed by the trustees, or such person or persons as aforesaid, and approved of by the bishop, which scale it shall be lawful for the trustees, or such person or

persons as aforesaid, with consent of the bishop, to alter from time to time as occasion may require: provided always, that all such pews as shall not be taken at the rents respectively fixed thereon, within fourteen days after the commencement of the ensuing year, shall in every such case be let to any inhabitant of any adjoining parishes or places in which there shall not be sufficient accommodation in the churches and chapels of the parish or place for the inhabitants thereof, at the rent respectively so affixed upon such pews, for any term not exceeding the end of the year, and at the expiration of the year, and also of every succeeding year, in which any such pews shall be rented by the inhabitants of any adjoining parishes, such pews shall be inserted in the list of vacant pews to be taken in preference by the inhabitants of the parish or place to which the church or chapel shall belong, and all such pews as may not be so taken by an inhabitant of the parish or place, may again be let, and so on from year to year, to any inhabitant of any adjoining parish or place.

Sect. 16 authorizes the churchwardens to sue for the rents in arrear, in the name of "the churchwardens of the church or chapel of ——," in like manner as 58 Geo. 3, c. 45, s. 73.

Sect. 22: The commissioners may, if they think fit, in all such cases as shall come before them, order and direct that the church or chapel shall be subject to all the provisions of the previous Church Building Acts or this Act, as to appointment of accommodation in pews and free sittings, and as to pew rents.

14 & 15 Vict. c. 97, s. 1: Where any body or person endows with such permanent provision in land or money, as is satisfactory to the said commissioners and the bishop of the diocese, any church for which pew rents have been previously fixed by the said commissioners, and where such

pew rents have not been assigned or appropriated under a local Act, such endowment or provision being made in lieu of and as a substitute for such pew rents, in whole or in part, the commissioners may by an instrument under their common seal, with the consent of such bishop under his hand and seal, setting forth the nature of such endowment, and that it was made for the object aforesaid, order and declare that such pew rents shall, with respect to such church, cease and determine, and the same shall according to such order and declaration cease and determine in whole or in part, and the seats or pews so exempted from rent shall thenceforth be at the disposal of the churchwardens of such church in like manner as the seats or pews of an ancient parish church, but the pew rents then due and payable are, nevertheless, to be payable, and recoverable in the same manner as if such order had not been made.

19 & 20 Vict. c. 104, s. 5: Every person resident within the limits of any new parish or district already formed under any of the Church Building Acts, or hereafter to be formed under the provisions of the said Acts, 6 & 7 Vict. c. 37, and 7 & 8 Vict. c. 94, or of this Act, who shall have claimed and have had assigned to him sittings in the church of such new parish, shall thereby surrender, as to any right that he may have possessed, an equal number of sittings in the church of the original parish or other ecclesiastical district out of which such parish shall have been taken, unless such last-mentioned sitting be held by faculty or under an Act of parliament.

Sect. 6: It shall be lawful for the commissioners, if it shall appear to them that sufficient funds cannot be provided from other sources, but not otherwise, with the consent of the bishop of the diocese, under his hand, to order and declare by an instrument in writing, under their common seal, that annual rents may be reserved and taken in respect

of any pews or sittings in any church to or for which a district may hereafter be assigned under the provisions of the said recited Acts (6 & 7 Vict. c. 37 and 7 & 8 Vict. c. 94), or of this Act, and such rents shall be charged, levied, and taken by the churchwardens for the time being of such church, after a rate or scale which shall be specified in such instrument, and the proceeds not otherwise appropriated by law shall be applied towards the repair and maintenance of the same church, and the maintenance of the minister and the services thereof, and the endowment of such church, in such manner as shall be specified in such instrument, and to no other uses : provided always, that one half at least of the whole number of pews or sittings in such church shall be free sittings, and that it shall be shown to the satisfaction of the said commissioners that the said free sittings will, with respect to position and convenience, be as advantageously situated as those for which a rent may be fixed and reserved.

Sect. 7: Upon a permanent endowment being provided for any church in which pew rents have previously been authorized to be taken, and upon such endowment being approved by the commissioners, they may thereupon, under such an instrument under their common seal as is hereinbefore mentioned, with the consent of the bishop of the diocese, make an equivalent reduction in the total amount of the rents authorized to be taken for the pew or sittings in such church, if the same shall not be appropriated by law for specific purposes, either by a reduction of the rate or scale, or by declaring certain specific pews or sittings theretofore chargeable with the rents to be absolutely free : provided always, that if any sum or sums of money have been borrowed under the authority of any Act of parliament or order in council upon the security of pew rents, such instru-

ment shall not take effect until after the repayment of all such sums so charged or chargeable (*a*).

Before concluding this section it may be well to call attention to the case of *Lloyd* v. *Burrup and another* (*b*). In that case the minister of the church of a district, which had been constituted under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, brought an action against the churchwardens for stipend due in respect of two quarters ending Michaelmas Day, 1867. By the assignment of his stipend out of the pew rents, which had been made by the commissioners acting under the above Acts, it was provided that the stipend should be 550*l.*, and should be paid quarterly on the four most usual quarter days, by even and equal portions, beginning from Christmas Day ; and if the pew rents did not in any one year produce 550*l.* after paying the clerk's salary, the minister should receive the residue of them in lieu of 550*l.* The defendants had paid over to the plaintiff all the moneys that had been paid for pew rents and had come to their hands prior to Michaelmas, but they held in their hands a sum of money which had been received at

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(*a*) The other sections relating to pews are 58 Geo. 3, c. 45, ss. 62, 64, 65, 66; 59 Geo. 3, c. 134, ss. 26, 27, 30, 31, 33; 3 Geo. 4, c. 72, ss. 23, 25; 5 Geo. 4, c. 103, ss. 10, 15; 1 & 2 Will. 4, c. 38, s. 31; 19 & 20 Vict. c. 104, s. 8; 32 & 33 Vict. c. 94, ss. 2, 3, 4, 5, 7,—these sections of 32 & 33 Vict. c. 94, which authorize the surrender and transfer of rights in pews enjoyed by virtue of any public or private Act of parliament, or of any deed or instrument, to the Bishop or Ecclesiastical Commissioners of England, apply also to the freeholds of churches and chapels, and of the vaults therein or thereunder, see sects. 6, 7 : and as to the appropriation of seats in the church of a united benefice left standing, the other church being pulled down, see 18 & 19 Vict. c. 127, s. 13. And see "The Church Seats Act, 1872" (35 & 36 Vict. c. 49), by which the Ecclesiastical Commissioners are authorized to accept a church site under a grant in which it is declared that the seats and pews, or a portion of them, shall not be let.

(*b*) 4 Ex. (L. R.) 63; 28 L. J. Ex. (N.S.) 25.

Michaelmas for pew rents payable in advance for the occupation of pews for the ensuing half year from Michaelmas to Lady Day: this sum amounted to 120*l.*, being less than a quarter's stipend. It was held, *first*, that the minister might maintain an action at law against the churchwardens by virtue of the provisions of the Acts and assignment; but, *secondly*, that the churchwardens were entitled to retain in their hands the 120*l.* against the stipend accruing after Michaelmas 1867; and, *thirdly*, that the defendants were not liable in respect of pew rents received by their predecessors in office, but which had not come to their hands.

SECTION II.

On the Duty of the Churchwardens with regard to the Performance of Divine Service, and to the Preservation of due Order and Decorum in the Church and Churchyard.

Another important duty of the churchwardens is to see that the parishioners regularly attend public worship, and also that due reverence and decorum be observed in the church and churchyard, not only during the time of divine service and sermon, but on all other occasions.

The churchwardens ought, therefore, themselves regularly to attend their church, and are to notice all those that come not to church, in order that they may be enabled to present them at the next visitation (*a*), and especially they are to see that in every meeting of the congregation peace be well kept (*b*).

The following canons will serve more particularly to regulate their duty in that respect :—

(*a*) Prid. 5, 9, 60.
(*b*) Can. 85.

"CAN. 18.—*A Reverence and Attention to be used within the Church in time of Divine Service.*

"In the time of divine service, and of every part thereof, all due reverence is to be used, for it is according to the Apostle's rule, '*Let all things be done decently, and according to order.*' Answerable to which charge and order we judge these our directions following:—No man shall cover his head in the church or chapel in the time of divine service, except he have some infirmity, in which case let him were a night-cap or coif. All manner of persons then present shall severally kneel upon their knees when the general confession, liturgy, and other prayers are read, and shall stand at the saying of the belief, according to the rules in that behalf prescribed in the Book of Common Prayer; and likewise, when in time of divine service the Lord Jesus shall be mentioned, due and lowly reverence shall be done by all persons present, as it had been accustomed, testifying by their outward ceremonies and gestures their inward humility, Christian resolution, and due acknowledgment that the Lord Jesus Christ, the true and eternal Son of God, is the only Saviour of the world, in whom alone all the mercies, graces, and promises of God to mankind for this life, and the life to come, are fully and wholly comprised. None, either man, woman, or child, of what calling soever, shall be otherwise at such times busied in the church than in quiet attendance to hear, mark, and understand that which is read, preached, or ministered, saying in their due place, audibly with the minister, the Confession, the Lord's Prayer, and the Creed, and making such other answers to the public prayers as are appointed in the Book of Common Prayer. Neither shall they disturb the

service or sermon by walking or talking, or any other way, nor depart out of the church during the time of service or sermon without some urgent or seasonable cause."

"Can. 19.—*Loiterers not to be suffered near the Church in time of Divine Service.*

"The churchwardens or questmen and their assistants shall not suffer any idle persons to abide either in the churchyard or church porch during the time of divine service or preaching, but shall cause them either to come in or to depart."

"Can. 111.—*Disturbers of Divine Service to be Presented.*

"In all visitations of bishops and archdeacons the churchwardens or questmen and sidesmen shall truly and personally present the names of all those which behave themselves rudely and disorderly in the church, or which, by untimely ringing of bells, by walking, talking, or other noise, shall hinder the minister or preacher."

It is moreover, the duty of the churchwardens to adopt such measures as shall be most effectual for preserving immediate order and decorum (*a*); and the Courts will protect them in the discharge of this duty, if they do no more than is necessary to secure the due performance of divine worship, and to prevent any inconvenience arising to the minister or the congregation assembled to hear divine service in the church (*b*).

To this end, if any boys shall behave themselves rudely or disorderly in the church, or shall make noise or other

(*a*) *Hutchins* v. *Denziloe and Loveland*, 1 Hagg. C. R. 172, *post*; *Cox* v. *Goodday*, 2 Hagg. C. R. 138.
(*b*) *Cory and others* v. *Byron*, 2 Curt. 396.

disturbance there, they may chastise them for it (*c*); or they may, if necessary, turn any person, who shall interrupt the service or disturb the congregation, out of the church (*d*), provided they use no unnecessary violence in so doing (*e*); but they will not be justified in detaining him in custody after he has been turned out (*f*).

Upon this ground it has been decided that the churchwardens were justified in preventing a person who had been wrongfully dismissed by the minister from the office of parish clerk, and whose place was filled by a clerk *de facto*, from forcing his way into the clerk's seat immediately before the commencement of divine service, and in turning him out of the church on his persisting in the attempt. The *Court* said that it made no difference whether the service was actually begun, or was about to begin, so long as the conduct of the plaintiff was such as to lead the churchwardens reasonably to suppose that he would offer interruption to the service (*g*).

So also, if any persons shall irreverently keep his hat on during the time of divine service, the churchwardens may take it off, after requesting him to do so himself, and no action of assault can be maintained against them for so doing (*h*).

This duty of maintaining order and decorum in the church lies *immediately* upon the churchwardens; and

(*c*) Prid. 12. So stated by Dr. *Prideaux*, *sed quære*.

(*d*) *Williams* v. *Glenister*, 3 B. & C. 699; 4 D. & R. 217, S. C.; *Burton* v. *Henson*, 10 M. & W. 105.

(*e*) *Reynolds* v. *Monkton*, 2 M. & R. 384.

(*f*) *Williams* v. *Glenister*, supra.

(*g*) *Burton* v. *Henson*, 10 M. & W. 105. As to the power of the churchwardens to turn a person out of the church for irreverent or unbecoming conduct, when divine service is not going on, see *Worth* v. *Terrington*, 13 M. & W. 781; 14 L. J. Ex. 133, and see *post*, p. 353, note (*d*).

(*h*) *Hawe* v. *Planner*, 1 Saund. 13; 2 Keb. 124; 1 Sid. 301; *Glover* v. *Hind*, 1 Mod. 168.

if they are not present, or being present, do not repress any indecency, they desert their proper duty (*a*).

But if, in the discharge of these duties, the churchwardens conduct themselves in a riotous, brawling, or otherwise improper manner, they will of course be responsible for their misconduct to the proper tribunals (*b*).

In the service, the churchwardens have nothing to do but to collect the alms at the offertory (*c*) ; and they may refuse

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(*a*) Per Sir *Wm. Scott* in *Cox* v. *Goodday*, 2 Hagg. C. R. 138.

(*b*) *Burder* v. *Selmes*, 1 Eccl. & Adm. Rep. 114.

(*c*) *Hutchins* v. *Denziloe*, 3 Phill. 70. These alms are, by the general law, at the disposal of the minister and churchwardens of the *parish*, whether collected at the *parish* church, or at a chapel of ease or proprietary chapel. *Moysey* v. *Hillcoat*, 2 Hagg. E. R. 30. See also the Rubric to the Holy Communion. And see *Magee* v. *The Bishop of Cashel*, 9 Irish Eq. R. 319, and *Dowdall* v. *The Rev. James Hewett* 10 L. T. (N.S.) 832. But the money given at the offertory at the churches of *district chapelries* and *consolidated chapelries*, formed under the Church Building Acts, is by 8 & 9 Vict. c. 70, s. 6, to be disposed of by the ministers and churchwardens of such churches, in the same manner as the money given at the offertory of any parish church is by law directed to be disposed of by the minister and churchwardens of such parish. That this statute does not entitle the minister and churchwardens of the churches of such chapelries to dispose of the offertory money collected at other chapels locally situated within the chapelry districts—and that such money is still at the disposal of the minister and churchwardens of the *parish*, see *Liddell and others* v. *Rainsford*, 38 L. J. Ecc. 15. These observations apply only to money given at the *offertory*. In the case in the *Court of Queen's Bench*, of *R.* v. *O'Neil* (a report of which will be found in the "Times" for November 15th, 1867, and in the "Justice of the Peace," vol. xxxi, p. 742), it was held that the churchwardens had no control over money collected during the service (not at the offertory) towards expenses incurred by the vicar for the benefit of the church, in pursuance of a notice from him that a collection would be made for that purpose. By "The Private Chapels Act, 1871" (34 & 35 Vict. c. 66), by which the bishop is authorized to license a clergyman to officiate in any chapel belonging to any college, school, hospital, asylum, or public or charitable institution, it is enacted, that the offertory and alms collected at any chapel subject to the provisions of that Act shall be disposed of as the minister thereof shall determine, subject to the direction of the ordinary.

the admission of strange preachers into the pulpit. For this purpose they are authorized by the canon (*d*), but when letters of orders are produced their authority ceases. Again, if the minister, introduces any irregularity into the service they have no authority to interfere, but they may complain to the ordinary of his conduct. There may, however, be cases where they are bound to interpose; for they may repress, and ought to repress, all indecent interruptions of the service by others, and are the most proper persons to repress them, and they desert their duty if they do not. And if a case could be imagined, in which even a preacher himself was guilty of an act grossly offensive, either from natural infirmity or from disorderly habits, it seems that the churchwardens, or even private persons, might interpose to preserve the decorum of public worship (*e*).

If any one shall either by word or deed, unlawfully interrupt, disturb, or abuse any minister in any church or chapel while he is there in the performance of any of the duties of his ministry, he is, by 2 & 3 Ed. 6, c. 1, to forfeit for the first offence 10*l*., or if that be not paid within six weeks after conviction, to suffer three months' imprisonment; and for the second offence he is to forfeit 20*l*., or if that be not paid within six weeks after conviction, to suffer six months' imprisonment; and for the third offence he is to forfeit all his goods and chattels, and to be imprisoned during life. By 1 Mar. 1, st. 2, c. 3 (*f*), he is to be committed to gaol for three months, and from thence to the next quarter sessions, when he is to be released or continued in prison as the Court shall see cause. By 1 Eliz. c. 1 (*g*),

(*d*) Can. 50.

(*e*) *Hutchin* v. *Denziloe and Loveland*, 1 Hagg. C. R. 172.

(*f*) That this statute extends to the divine service now established, see *Paul Moone's case*, Sir T. Jones, 159.

(*g*) *Sic* in Dr. *Prideaux's* work, but it should be C. 2.

he is to forfeit for the first offence 100 marks, and if that be not paid within six weeks after conviction, to suffer six months' imprisonment; and for the second offence to forfeit 400 marks, and if that be not paid within six weeks after conviction, to suffer imprisonment for one whole year; and for the third offence to forfeit all his goods and chattels, and be imprisoned during life. And by 1 W. & M. c. 18, every such offender is to forfeit 20*l.*, *toties quoties*, *i.e.*, as often as it shall happen. And wherever any such offence is committed, it is the duty of the churchwardens to see that the law be executed upon all that offend herein, that so the service of God may be secured from all such affronts and disturbances; and they have the choice of any one of these statutes to prosecute them upon (*a*).

Or the churchwardens may proceed against the offender, and in ordinary cases would do well to proceed against him, under the recent statute for abolishing the jurisdiction of the Ecclesiastical Courts in Ireland (*b*) in cases of defamation, and in England and Ireland in certain cases of brawling (*c*). By that statute the jurisdiction of the Ecclesiastical Courts in England and Ireland in all suits and causes of brawling commenced after the passing of the Act (*d*) against any person not being in holy orders, is taken away (*e*); whilst by the same statute, a summary proceeding before two

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(*a*) Prid. 22, 23. The above mentioned statute of W. & M. is directed generally against the wilful disquieting and disturbing of the congregation, or misuse of the clergyman. Dr. Prideaux adds that the statute applies also to "those who shall disturb any dissenting congregation allowed by law; but as to this the churchwardens are not concerned."

(*b*) The jurisdiction of the Ecclesiastical Courts in England and Wales in suits for defamation was abolished by 18 & 19 Vict. c. 41.

(*c*) 23 & 24 Vict. c. 32.

(*d*) 3rd July, 1860.

(*e*) Sect. 1.

justices of the peace is given against any person who shall be guilty of riotous, violent, or indecent behaviour, in any cathedral, church, or chapel, whether during the celebration of divine service or at any other time, or in any churchyard or burial ground, or who shall molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorized to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament or any divine service, rite, or office, in any cathedral, church, or chapel, or in any churchyard or burial ground and he is made liable to a penalty of not more than 5*l.* for every such offence, or to be committed to prison for any time not exceeding two months (*f*).

By section 3 every such offender may be immediately and forthwith after the offence committed apprehended and taken by any constable or churchwarden of the parish or place where it shall be committed before a justice of the peace of the county or place where it shall have been so committed, to be dealt with according to law; and by section 4, an appeal is given upon certain conditions to any person convicted under this Act, who shall think himself aggrieved by the conviction, to the next Court of General or Quarter Sessions, which shall be holden not less than twelve days after the day of such conviction, for the county, riding, division, city, or borough, wherein the cause of complaint shall have arisen (*g*).

(*f*) Sect. 2. In the case of *Rt. Rosier*, who was convicted under this statute for molesting the Rev. *Dove Dove* at the church of *St. George's-in-the-East* whilst celebrating divine service there, the assistant judge (*Bodkin*) and bench of magistrates at the *Middlesex* quarter sessions quashed the conviction, because it imposed a penalty, and in default of payment imprisonment, being of opinion that such sentence in the alternative was not sanctioned by the Act. See a report of the case in the "Times" for Nov. 1st, 1860.

(*g*) This statute is given at length in the Appendix, see

Attention should be called here to the recent case of *Cope*, clerk, app., and *Barber and others*, resp. (*a*), in which it was held that the collection of the offertory during the reading of the offertory sentences, and which is by the rubric directed to be made "by the deacons, churchwardens, or other fit person" (*b*), which term "other fit person" does not include a priest as such, is a *lay* duty, and that the interruption of the minister who takes upon himself to discharge that duty, whilst he is in the performance of it, is not the interruption of a "clergyman in holy orders celebrating divine service" within the meaning of the second section, although it may amount to riotous, violent, or indecent conduct within the meaning of the former part of the section.

The collection of the offertory is indeed part of divine service; but the rubric never contemplated the collection of the offertory as a duty to be performed by a *clergyman in holy orders;* and the legislature meant the words to apply to something in the course of being done, which in its character could only be done by a clergyman in holy orders; and *Willes*, J., said that whether or not the section would protect the *deacon* might be a question of nicety.

The churchwardens are bound to protect the sanctity of the church and churchyard, not only during the celebration of divine service, but at all other times and on all occasions; for those places, with the appurtenances, are set apart for the worship of the Supreme Being, and for the repose of the dead; and nothing but religious awe and Christian good-will between men should prevail there (*c*).

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p. xxiv. That a person disturbing divine service may at common law be removed by any person present, by the same rule of law that allows a man to abate a nuisance: see *Glover* v. *Hinde*, 1 Mod. 168.

(*a*) 7 C. P. (L. R.) 393.

(*b*) See the first rubric at the end of the offertory sentences.

(*c*) See *Palmer* v. *Roffey*, 2 Add. 144.

They are, therefore, to see that no plays, feasts, banquets, suppers, church ales, drinkings, temporal courts or leets, lay jurors, musters, or any other profane usage, be kept in the church or churchyard; and that the bells be not rung superstitiously upon holy days or eves abrogated by the Book of Common Prayer, nor at any other times without good cause, to be allowed by the minister of the place and by themselves (*d*).

Again: although the soil of the churchyard be in the parson, and the churchwardens may not perhaps feel themselves called upon to interfere, if he merely turn a horse or a few sheep into the churchyard to pasture therein; yet if he profane the place by keeping swine or cattle therein, permitting them to turn up the soil, and disregarding the feelings of those whose relations are buried in the ground,

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(*d*) Can. 88. It seems, however, from the report of the case of *Worth* v. *Terrington*, 13 M. & W. 781, 14 L. J. Ex. 113, to be questionable whether a churchwarden has the right, by virtue of his office, to turn a person out of the church or churchyard for misconduct, at a time when no service of the church is going on, and that he has no right, of his own authority, to turn a person out for a trespass, who is not misconducting himself, even whilst divine service is going on; and that he could only justify such acts under the rector, and after a request to the party to leave. *Parke*, B., is, indeed, according to the report in M. & W. reported to have said, on *Jarratt* v. *Steele*, 3 Phill. 167, being cited as an authority that the churchwardens with the concurrence of the rector have power to turn a person out for a trespass, "We ought to have higher authority than the decision of Doctors' Commons for that proposition." But he subsequently denied having said this, and on the margin of his own copy of 13 M. & W. are these words in his own handwriting:—"I never said so." See 7 C. P. (L. R.) 404, n. (1). The statement of Sir *John Nicholl* in *Jarratt* v. *Steele*, that "the possession of the church is in the minister and churchwardens, and that no person has a right to enter it when it is not open for divine service, except with their permission, and under their authority," is adopted by the *Queen's Bench* in *Griffin* v. *Deighton*, 5 B. & S. 93; 33 L. J. Q. B. 29; and by the *Exchequer Chamber* in the same case in error, 5 B. & S. 93; 33 L. J. Q. B. 181. That the churchwardens, however, have only the custody of the church under the minister, see *post*, section 4, p. 361.

or by converting the church porch into a stable for his horses, he will have incurred ecclesiastical censures, and it will be the duty of the churchwardens to endeavour at once to put a stop to such irreverent conduct, and at all events to present him at the next visitation (*a*); the law is the same if the soil be otherwise unnecessarily disturbed, or the churchyard violated in any other manner (*b*).

So, if the parson proceed to pull down the walls of the churchyard, to stop up a church path therein, or to do any other injury thereto, he should be presented at the next visitation (*b*). And the churchwardens may also obtain from the Court of *Chancery* an injunction to restrain him from such illegal conduct (*c*).

Upon the principle that churchyards are not to be profaned a faculty for the purpose of applying any portion of the consecrated ground to purely secular purposes has always been refused. Thus, in *The Rector and Churchwardens of St. John's, Walbrook*, v. *The Parishioners thereof, and all others in general* (*d*), Dr. *Lushington* refused a faculty for removing the boundary wall of a churchyard for facilitating the making of a new street, although the application was not opposed, and it was shown that the removal would have benefited the parish. So, a faculty to erect a charity school-room on part of the churchyard will be refused (*e*); but a faculty to build a vestry-room which may be used for religious purposes has been granted, though not without

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(*a*) *Burgoyne* v. *Free, D. D.*, 1 Hagg. C. R. 456.

(*b*) *Bennett* v. *Bonaker*, 2 Hagg. E. R. 25.

(*c*) *Walter* v. *Montague and Lamprell*, 2 Curt. 253; *Marriott* v. *Tarpley*, 9 Sim. 279; see also *Quilter* v. *Newton*, Carth. 151.

(*d*) 2 Roberts, 515.

(*e*) *Campbell and another* v. *The Parishioners of Paddington and others*, 2 Roberts, 558, and see *The Rector of St. George's Hanover-square*, v. *Stewart*, 2 Str. 1126, and the office of the judge promoted by *Harpur* v. *Forbes and Sisson*, 3 Jur. (N.S.) 275.

hesitation (*f*); and in the recent case of In re *Bettison* (*g*) the Dean of *Arches*, Sir *R. Phillimore*, on appeal from the *Consistory Court* of Rochester, granted a faculty for the erection of an infant school for promoting the education of the poor in the principles of the Established Church, which had been required by the Education Department in pursuance of "the Elementary Education Act, 1870" (33 & 34 Vict. c. 75), on the closed churchyard of St. Nicholas, Harwich, such faculty having been refused by the chancellor of the diocese on the ground that it could not be granted, as the Burial Acts determined the manner in which closed churchyards were to be kept.

And if a party is proved to have interfered illegally with the soil of the churchyard or the erections upon it, it has invariably formed part of the judgment of the Court that he shall restore to its former state what he has so interfered with (*h*).

(*f*) *Campbell and another* v. *The Parishioners of Paddington*, supra.

(*g*) 4 Add. & Ecc. (L. R.), 294.

(*h*) See the office of the judge promoted by *Harpur* v. *Forbes and Sisson*, 5 Jur. (N.S.) 274. In this case the churchwardens had, with the sanction of the vicar, the rural dean, and the bishop of the diocese, permitted a portion of the churchyard to be severed and formed into part of a public road. Dr. *Lushington* said he had no power to sanction the act, and expressed a strong opinion that, even under these circumstances, he was bound to order the ground to be restored to its former state, if the promoter insisted on it. And see *The Vestry of St. Pancras* v. *The Vicar and Churchwardens of St. Martin-in-the-Fields*, 6 Jur. (N.S.) 207. See also *Dewdney* v. *Good and Ford*, Arches, 7 Jur. (N.S.) 637, and see *The Bishop of St. David's* v. *De Rutzen*, ibid. 884; 7 L. T. (N.S.) 697. In a subsequent stage of the last-named case to that reported in the above report the *Dean of Arches*, Dr. *Lushington*, said that no other course was open to him but to grant the prayer of the promoter, and he therefore ordered that the church should be restored within six months, and condemned the defendant in the costs of the suit; but he said that it would afford him great satisfaction if the parties would revert to what clearly appeared to be the original intention, and make some arrangement whereby a new church would

The churchwardens are also to take care that none contend or quarrel in the church or churchyard, or upon any occasion make any broil or brawling there (*a*).

In such cases the proceedings should ordinarily be taken, and where the offender is a layman and no breach of the peace has been committed, must be taken under the recent statute for abolishing the jurisdiction of the Ecclesiastical Courts in England and Wales in suits and causes of brawling, which has already been referred to (*b*); but as these courts still have jurisdiction in cases of brawling over persons in holy orders, and as the decisions on the subject may still be of some service in defining the offences and showing the extent of the jurisdiction of those courts, it has

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be built for the accommodation of the parishioners. It may be mentioned here, that in a case before Vice-Chancellor *Wood*, that learned judge is reported to have said in effect, that no length of time—nothing but an Act of parliament or a faculty, which is never granted for secular purposes,—can give a title to a building erected on consecrated ground. *The Attorney-General* v. *Merchant Taylor's Company*, Coram *Wood*, V. C., November 3, 1853. The case is reported in the "Times" for November 5, 1858, but the author is not aware of any other report. And see *R.* v. Sir *Travers Twiss*, 4 Q. B. (L. R.) 407; 38 L. J. Q. B. 228, where *Cockburn*, C. J. laid down the law to the same effect, although the Court refused the prohibition, *first*, because the petition prayed a faculty for a lawful object, *viz.*, the erection of a chapel, as well as an unlawful object, *viz.*, additions to a workhouse, and, no judgment having yet been given by the Court *Christian* they would not presume that it would exceed its jurisdiction, and *secondly*, because the party applying for the prohibition was a stranger to the parish. See also *Adlam* v. *Colthurst*, 36 L. J. Ecc. 14. In this case the defendant was pronounced in contempt for disobedience to an order and monition to replace the bones and soil in the churchyard, although he had conveyed the field in which he had placed them to the trustees of his daughter's marriage settlement before the commencement of the suit against him: see *Adlam* v. *Colthurst*, 37 L. J. Ecc. 36; 2 Ad. & Ec. (L. R.) 30. That a faculty is necessary to authorize the removal of the bodies from a churchyard which has been appropriated by statute to secular purposes, see *Stebbing* v. *The Metropolitan Board of Works*, 6 Q. B. (L. R.) 37.

(*a*)) Prid. 10.

(*b*) 23 & 24 Vict. c. 32.

been thought desirable to retain in this edition the few remarks on the subject which conclude this section.

By 5 & 6 Ed. 6, c. 4, s. 1, it is enacted, that if any person shall, by words only, chide or brawl in any church or churchyard, the ordinary, on proof of two witnesses, may suspend every layman, being an offender, *abingressu ecclesiæ*, (*i. e.*, from entering into the church,) and every clergyman from the ministration of his office, so long as he shall think meet. And by section 2 it is enacted, that if any shall smite or lay any violent hands on another in any church or churchyard, he shall be deemed, *ipso facto* excommunicate, and be excluded from the fellowship and company of Christ's congregation (*c*).

This statute did not create the offence of brawling, which existed at common law. "The law, not merely the statute of Ed. 6, but the general ecclesiastical law, protects the sanctity of public worship, and still more, endeavours to prevent every circumstance which may lead to the disturbance of persons engaged in solemn acts of devotion. It prohibits all quarrelling, chiding, and brawling in the church or churchyard, and requires decent and orderly behaviour (*d*); and proceedings might still, notwithstanding the statute, have been taken at common law, for where a statute leaves an offence as it found it, and only introduces additional punishment, a party may proceed either on the statute, or on the ancient law (*e*).

The *Ecclesiastical Court* had jurisdiction over all cases of brawling and smiting within the precincts of the church

(*c*) By the 4th section of 23 & 24 Vict. c. 32, this statute is expressly repealed, so far as it relates to persons not in holy orders.

(*d*) Per Sir *John Nicholl*, in *Newberry* v. *Goodwin*, 1 Phill. 282; see also *Palmer* v. *Roffey*, 2 Add. 144; *Cox* v. *Goodday*, 2 Hagg. C. R. 138; *Cory* v. *Byron*, 2 Curt. 396.

(*e*) *Wenmouth* v. *Collins*, Lord Raym. 850. Ex parte *Williams*, 4 B. & C. 315; and see *Hutchins* v. *Denziloe*, 1 Hagg. Con. 181; *Taylor* v. *Manley*, 1 Curt. 470 (see pp. 482, 485), and *Burder* v. *Selmes*, 1 Ecc. & Ad. Rep. 115.

and churchyard *ratione loci;* and provocation on the part of the promoter constituted no defence, for the object was not to protect the individual, but the sacredness of the place (*a*); in all such cases, where two persons were implicated, which was most to blame was clearly immaterial, each was bound to abstain, and each, failing to abstain, incurred a like penalty (*b*).

A greater latitude of expression and manner, however, is allowed at vestry meetings than in the church, and "that may be chiding and brawling in the church, which would not be so in the vestry" (*c*).

In like manner, that may be indecent and censurable during divine service, which would not be so when the service was ended (*d*); or, on the contrary, that may be indecent after the service, which would not be so during its continuance (*e*).

SECTION III.

On the Repairs of the Chancel, &c.

Although the churchwardens be not charged with the repairs of the chancel, yet they are with the supervisal both

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(*a*) *Austen* v. *Dagger*, 3 Phill. 152; *Jarman* v. *Bagster*, 3 Hagg. 350.

(*b*) *Palmer* v. *Roffey*. 2 Add. 131; *Ib.* 306. And see *Burder* v. *Hale*, 6 N. E. C. 611; *Burder* v. *Selmes*, 1 Ecc. & Adm. Rep. 139.

(*c*) Per Lord *Stowell*, in *Hutchins* v. *Denziloe*, 1 Hagg. C. R. 185; see also *Taylor* v. *Manley*, 1 Curt. 470.

(*d*) See *Worth* v. *Terrington*, 13 M. & W. 781.

(*e*) See the observation of *Parke*, B., in *Worth* v. *Terrington*, supra. In that case the learned judge is made to say, "it is plain that an act may be indecent during divine service, which is not so when service is at an end. My brother *Rolfe* has suggested the converse of this case. A person who during divine service, utters the responses in a loud tone, is not guilty of indecency; but it would be far otherwise if he did so when the service was concluded." See the report of this case in 14 L. J Exch. 133, where the judgment of *Parke*, B., is given more fully than in *Meeson* v. *Welsby*.

of that and the minister's house, to see that neither of them be permitted to dilapidate, or fall into decay ; and when any such dilapidation shall happen in either of them, if no care be taken to repair them, they are to make presentment thereof at the next visitation (*f*).

The duty of effecting the repairs of the chancel, as before observed, lies upon the parson, whether appropriator, impropriator, or instituted rector, except in some churches, where the vicar is by special composition bound to repair, and then the vicar hath the freehold of the chancel, as well as of the body of the church and churchyard ; the former by virtue of this composition, and the latter by virtue of his induction. For every vicar, when he is inducted into the church, takes possession of the body of the church and the churchyard, as of his freehold, and is then, as it were, by livery of seisin, admitted thereto, as the rector is by like induction to the whole church (*g*).

As the soil and feed of the churchyard are in the minister, so also are the trees growing therein ; but he is not to cut them down unless for necessary repairs of the chancel, or else that he shall think fit, out of charity and kindness, to allow them to the parishioners for the repair of the body of

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(*f*) Prid. 28. Under the "Ecclesiastical Dilapidations Act, 1871" 34 & 35 Vict. c. 43, amended by 35 & 36 Vict. c. 96, for the amendment of the law relating to ecclesiastical dilapidations the enquiry by the bishop is to be set on foot by the complaint in writing of the archdeacon, or of the rural dean, or of the patron of the benefice. The churchwardens are not among the persons authorized to make the complaint. But they may with a view to proceedings under this Act, with propriety call the attention of the archdeacon or rural dean to the state of the buildings.

(*g*) Prid. 28. The interest of the vicar depends upon the endowment, but he is always entitled to the *possession* of the church and churchyard for spiritual purposes, see *Griffin* v. *Deighton*, 5 B. & S. 93 ; 33 L. J. Q. B. 29, affirmed in error, 5 B. & S. 93 ; 33 L. J. Q. B. ; *Greenside* v. *Darby*, 3 Q. B. (L. R.) 421 ; 37 L. J. Q. B. 137, *ante*, p. 71, note, (*c*).

the church; but where they used to be topped, the toppings belong to the minister (*a*); he may also cut down the trees for the necessary repair of the rectory-house with its appurtenances (*b*).

In like manner he may cut down the trees growing upon the glebe for the purpose of these repairs (*c*).

But he will not be justified in cutting down and selling the timber, although he may have expended on the repairs of the chancel, rectory-house, &c., a much larger sum than he received from the sale of the timber (*c*).

Nor has he any right to do this for the purpose of making a general repairs fund for the repair of dilapidations (*d*).

But for the purposes of necessary repairs he may, perhaps, be entitled to cut down and sell the timber, when it is at a distance from the property to be repaired, and procure an equivalent of other timber from a more convenient place with the proceeds (*e*).

If an impropriator have the rectory, but the vicar is bound to repair, he shall have the trees in the churchyard to repair the chancel and parsonage, with the pews, barns, or out-houses thereto belonging (*f*).

(*a*) Prid. 33; 35 Edw. 1, stat. 2, commonly called *Statutum ne Rector prosternat arbores in cemeterio.* This statute or writ will be found in 1 Gib. Cod. 207, 208, and it seems to bear out Dr. *Prideaux's* statement with reference to the repair of the body of the church. *Cox* v. *Ricraft*, 2 Lee (Sir. G.), 373.

(*b*) *Strachy* v. *Francis*, 2 Atk. 217; *The Duke of Marlborough* v. *St. John*, 21 L. J. Ch. 381.

(*c*) *Duke of Marlborough* v. *St. John*, supra.

(*d*) *Sowerby* v. *Fryer*, 8 Eq. Ca. L. R. 417.

(*e*) *Id.*, explaining Lord *Hardwicke's* language in *Knight* v. *Moseley*, Amb. 176.

(*f*) *Strachy* v. *Francis*, 2 Atk. 216; see Tyr. Prid. 28.

SECTION IV.

On the Right of the Churchwardens to Access to the Church, and their Power and Duty with reference to the Disposal of the Goods and Utensils of the Church, and as to the setting up and removing of Fixtures, Monuments, Tombs, &c. On the Ringing of the Church Bells.

As the churchwardens are bound to keep the church in repair, both externally and internally, and to see that all necessary things are provided for the use of the parishioners, and for the due celebration of the divine offices, they ought, of course, to have free access to the church at all reasonable times; but the possession of the church being in the minister, he is entitled to the possession of the key, and the churchwardens have only the custody of the church under him: if he refuse access to the church on fitting occasions, it will be irregular for the churchwardens to procure a key for themselves: complaint must, in such case, be made to the proper authorities (*f*).

It has been already stated that the goods and chattels of the church are vested in the churchwardens for the use of the parishioners (*g*); but it must be borne in mind, that the mere fact of placing goods in the church (even though they are of a character to benefit the parishioners gene-

(*f*) *Lee* v. *Matthews*, 3 Hagg. C. R. 173; *Redhead* v. *Wait and others*, 6 L. T. (N.S.) 580; *Dewdney* v. *Good and Ford*, 7 Jur. (N.S.) 673. In the last-named case the churchwarden was ordered to deliver up to the rector a new key which he had fitted to the door of the church. See a reference to this case, *supra*, p. 198, and see *Ritchings* v. *Cordingly*, 3 Ad. & Ec. (L. R.) 113.

(*g*) *Ante*, p. 49; and see *Jackson* v. *Adams*, 2 Bing. N. C. 402; *Moss and another* v. *Thorniley*, 27 L. T. 131.

rally, and not merely the person placing them there, as gas-fittings for lighting the church), does not make them parish property. In order to make them parish property there must have been an intention on the part of the owner to dedicate them to the parish, and there must be some evidence of such intention to justify the conclusion that he has done so (*a*).

As the churchwardens are a corporate body (*b*), and for the benefit of the parish, and not to the prejudice of it, they cannot dispose of any of the church goods without the consent of the parish and the license of the ordinary; not without the consent of the parish, because they are their goods, and not without the license of the ordinary, because they appertain to holy things, of which he hath the care and ordering; and therefore if the churchwardens would sell an old bell towards other repairs, or put off old communion plate to buy new, or dispose of any other of the goods of the church, although to the use of the parish, they cannot do it without the consent of the parish and the license of the ordinary as aforesaid; and the disposal of any of the said goods without the consent of the parish is void in law. For the parishioners are the proper owners of them, and the churchwardens are only entrusted with their custody for the use of the said parishioners. However, in this case, the parishioners themselves can have no action for such goods thus disposed of, either against the receivers to recover them, or the churchwardens for disposing of them; for although the goods belong to the parishioners in common, yet not they, but the churchwardens are the corporation in whom they are

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(*a*) *Moore* v. *Cooke*, M. T. 1841, M.S.

(*b*) As to describing churchwardens as a corporation, *vide supra*, pp. 49, 70.

invested for their use, and therefore when there is cause for any such action they must tarry till they have new churchwardens, and in their name bring the suit, who have a right to call their predecessors to an account before the ordinary, and also to commence suit against them for any such waste made by them for the church goods as aforesaid, or for any other damage done to the parish, contrary to the trust invested in them (*c*).

But that the churchwardens may dispose of the church goods with the consent of the parishioners appears from the case of *Method* v. *Wynn* (*d*), where it was held that they may, with such consent, take a ruinous bell and deliver it to a bell founder, and agree that he shall have a sum for casting it, on which the bell founder may retain the bell till he be paid, and that such an agreement will excuse the churchwardens in a writ of account brought against them by their successors; and also, that they may, with the like consent of the parishioners, take stones belonging to the church, and empower a builder with part of them to repair a ruinous window, retaining the residue to himself, in satisfaction of his labour and expenses (*e*).

But in order to render the disposal of the goods valid in law it must be the act of both the churchwardens; for the churchwardens, being a corporation, cannot act separately.

(*c*) Prid. 123, 124, 125.

(*d*) 1 Roll. Abr. 393.

(*e*) It would seem indeed, from the judgment of the Lords Commissioners of the Great Seal in *Martin and Wife* v. *Watkin and others*, 2 P. Wms. 268, that the churchwardens may themselves dispose of church goods for the benefit of the parish, or enter into a reasonable agreement beneficial to them, so as to bind the parishioners and their successors, as also the succeeding churchwardens.

One churchwarden cannot give an effectual release, or dispose of the goods of the church (*a*).

But if the churchwardens employ an agent to collect and expend the rate, and the agent expends any portion of it illegally, without the sanction of one of the churchwardens, but without the knowledge or sanction of the other, they cannot recover the amount so illegally expended from the agent (*b*).

Again: the churchwardens being appointed for the repair of the church, can have no power or authority to deface or demolish anything in it; but if there should be any superstitious pictures or paintings in the windows, or on the walls, or elsewhere, which may give just cause of offence, or anything else which may either be an hindrance to the due performing of any of the divine offices, or be inconvenient to the parishioners in their attendance on them, the license of the ordinary must be first had before they can be legally removed; but the monuments, coats of arms, paintings on the windows or elsewhere, pennants, hatchments, &c., put in the church for the memory of the deceased buried there, if regularly set up with the consent of the minister who hath the freehold, cannot be pulled down again, either by the churchwarden, minister, or ordinary, because they belong to the heir, and he will have his action upon the case against any that meddle with them (*c*), and so may also the churchwardens (*d*).

(*a*) *Starkie* v. *Barton*, Cro. Jac. 234. That he cannot pledge the credit of his co-churchwarden, see *Northwaite* v. *Bennett*, 2 C. M. 316; 4 Tyr. 236, S. C.

(*b*) *Cooper* v. *Law*, 6 C. B. (N.S.) 502.

(*c*) Prid. 100, 111; Co. Lit. 186; *Spooner* v. *Brewster*, 3 Bing. 136. In this case, however, the action was in *trespass*, and it was held rightly brought.

(*d*) *Bishop* v. *Turner*, Godbolt, 279.

But if any of the said particulars be an incumbrance, or any annoyance to the church, or any way hindering or incommoding, either the minister in performing any of the divine offices, or the parishioners in partaking of them, in this case the ordinary hath power to give his order for their removal, and the churchwardens will be justified in the executing of it; for the original intent of the church being the service of God Almighty, nothing is to be permitted there which shall be by any way obstructive of it; and of what is so, or is not so, the bishop is the sole judge, and therefore no one can be safe in any new erection there who hath not had the bishop's license for the same, especially in setting up altar monuments, which mostly in the end are a nuisance and incumbrance to the church, wherever they are placed (*e*).

Although a faculty is, in strictness, required in all these cases, it is in practice frequently dispensed with under the confidence reposed in the minister (*f*); but the consent either of the minister or of the ordinary is absolutely necessary, and a custom for churchwardens to set up monuments, &c., without the consent of either, is illegal (*g*). It seems, however, that if the monument be once set up, it cannot be removed without the sanction of the ordinary (*h*).

Again: it is illegal to place upon a monument any inscription contrary to the articles, canons, and constitutions, or to the doctrines or discipline of the Church of England; and any person so offending is liable to

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(*e*) Prid. 111, *ante*, c. 2, s. 4.

(*f*) *Maidman* v. *Maples*, 1 Hagg. C. R. 208; *Seager* v. *Bowle* 1 Add. 541.

(*g*) *Beckwith* v. *Harding*, 1 B. & A. 508.

(*h*) *Rich* v. *Bushnell*, 4 Hagg. 164; *Maidman* v. *Malpas*, 1 Hagg. Consist., see p. 219.

ecclesiastical censures, and to have the stone removed. This was admitted in argument, and expressly laid down by Sir *Herbert Jenner Fust* in his judgment in the case of *Breeks* v. *Woolfrey* (*a*), which was a criminal proceeding against a parishioner of the parish of Carisbrook, in the Isle of Wight, for setting up a tombstone in the parish churchyard, with the following inscriptions: "Pray for the soul of J. Woolfrey. 'It is a holy and wholesome thought to pray for the dead.'" Judgment was, indeed, in that case given in favour of the defendant on the ground that the inscription was not illegal, as the primitive practice of prayer for the dead, though discontinued in her public services through fear of its leading the vulgar mind to embrace the Romish error of purgatory, has not been prohibited by any law or canon of our church; but the learned judge clearly laid it down that the defendant would have been liable if the inscription had been illegal.

The attention of the churchwardens should be called here to the recent case in the Diocesan Court of *Lincoln* before Mr. *Walter Phillimore*, the *Chancellor* of the Diocese, as to the right of a Wesleyan minister to be described as a "Reverend Wesleyan minister" in the inscription on a tombstone in a parish churchyard. The petition, which was for a citation to obtain a faculty, was filed on behalf of a gentleman who described himself as the "Reverend Henry Keet, Wesleyan minister," and it stated that he was a resident parishioner of the parish of *Owston Ferry*—that in May, 1874, he lost a daughter, who was buried in the churchyard of the parish, and that he was anxious to erect over her grave a tombstone bearing this inscription—"In loving memory of Annie Augusta Keet, the younger daugh-

(*a*) 1 Curt. 880.

ter of the Reverend H. Keet, Wesleyan minister, who died at Owston Ferry, May the 11th, 1874, aged 7 years and 9 months. 'Safe sheltered from the storms of life.'" The vicar refused to allow him to erect a tombstone bearing such inscription on the ground that it included the words "Reverend" and "Wesleyan minister." The bishop of the diocese, on being appealed to, replied that it was the duty of the incumbent to examine the epitaphs which it might be proposed to inscribe on gravestones in the churchyard of his parish, and that he was empowered by law to make objections to anything in them which in his judgment was liable to exception, and he sustained the vicar's objection to the inscription. The Archbishop of *Canterbury*, presuming that the petitioner was a regularly appointed permanent minister of the Wesleyan denomination, did not feel called upon to give a legal opinion as to the action of the incumbent, but certainly considered that the objections urged by him should not be made. His Grace's letter was addressed "to the Reverend Henry Keet."

The *Chancellor*, in a learned and elaborate judgment, which will be found at length in "The Times" for Friday June 4th, 1875, upheld the vicar in his refusal to allow the inscription, and declined to issue the citation. In the course of his judgment he said that, "bearing in mind the general law of the church, and also canon 9 of the canons of 1603, and the history of the Wesleyan Methodists, he doubted much whether the words 'Wesleyan minister' alone would not be unlawful, and that he was of opinion that to describe a person as being a 'Reverend Wesleyan minister' might be the means of disseminating doctrines inconsistent with those of our Church," that "the endeavour seemed to be to obtain our authoritative sanction by the Church of that title. The inscription did not run as if that were a mere claim of the title by that gentleman; it

stated his title as a fact. If the inscription had been worded in any way which would show that that was an asserted title, he would have strained a point in his favour, and issued a citation. He would do so now on a fresh petition proposing such a modified inscription." It should be added that formal notice of appeal was forthwith given by the proctor of Mr. Keet.

Before concluding this chapter it may not be amiss to furnish the churchwardens with the following extract from Dr. *Phillimore's* edition of *Burn's* Ecclesiastical Law, with reference to the power and authority of the churchwardens over the bells of the church (*a*) :—

"Although the churchwardens may concur in directing the ringing or tolling of the bells on certain public or private occasions, the incumbent, nevertheless, has so far the control over the bells of the church that he may prevent the churchwardens from ringing or tolling them at undue hours, and without just cause. Indeed, as the freehold of the church is vested in the incumbent, there is no doubt that he has a right to the custody of the keys of the church, subject to the granting admission to the churchwardens for purposes connected with the due execution of their office. Proceedings may be instituted in the *Ecclesiastical Court* against churchwardens who have violently and illegally persisted in ringing the bells without consent of the incumbents. The citation may be as follows :—'*For violently and outrageously breaking into the belfry of the parish church of ——, without leave and permission of the rector, and, in defiance of his authority, several times ringing the bells in the said church.*'

"I have not been able to discover any judicial decision directly upon this point ; but the preceding statement is in

(*a*) See vol. i. p. 135.

accordance with the opinions given by several eminent civilians upon the subject. The exclusive right of the minister to the custody of the key of the church is clearly laid down by Sir *John Nicholl* in *Lee* v. *Matthews"* (*b*).

The correctness of the above views expressed by Dr. *Phillimore* has been established by the recent cases of *Harrison* v. *Forbes and Sisson* (*c*), and *Redhead* v. *Wait and others* (*d*). These cases decided that the parishioners cannot, except on the occasion of divine worship, or perhaps under very special circumstances, procure the ringing of the church bells against the consent of the incumbent, and that it is an ecclesiastical offence not merely in the parishioners generally, but also in the churchwardens, to break into the belfry and ring the bells against his consent. But to justify criminal proceedings against them for improperly ringing the bells the act must have been done *against* his consent; it will not be sufficient that it was done *without* it (*e*.).

(*b*) 3 Hagg, C. R. 173, *ante*, p. 361. See also some valuable observations on the ringing of the bells of the church in two little pamphlets published by the *Cambridge Camden Society*, called *A Few Hints to Churchwardens on Churches and Church Ornaments. No.* 1, *Suited to Country Parishes. No.* 2, *Suited to Town and Manufacturing Parishes.* These are most valuable little pamphlets, and ought to be in the hands of every churchwarden.

(*c*) 6 Jur. (N.S.) 1353.

(*d*) 6 L. T. (N.S.) 580.

(*e*) See *Daunt* v. *Crocker and others*, 2 Ad. and Ecc. (L. R.) 41; 37 L. J. Ecc. 1.

CHAPTER V.

ON VISITATIONS AND PRESENTMENTS, ETC.—ON SEQUESTRATIONS—ON THE GOING OUT OF OFFICE AND THE PASSING OF THE CHURCHWARDENS' ACCOUNTS.

SECTION I.

On Visitations and Presentments, and the General Duties of the Churchwardens as the Guardians of the Moral Character and Public Decency of the Parish; and on "The Public Worship Regulation Act, 1875."

For the government of the church and the correction of offences, visitations of parishes and dioceses were instituted in the ancient church, that so all possible care might be taken to have good order kept in all places (*a*).

For the first six hundred years after Christ, the bishops in their own person visited all the parishes within their respective dioceses every year, and they had several deacons in every diocese to assist them. After that they had authority, in case of sickness or other public concerns, to delegate priests or deacons to assist them; and hereupon, as should seem, they cantoned their great dioceses into archdeaconries, and gave the archdeacons commission to visit and inquire, and to give them an account of all at the end of their visitation, and the bishops reserved the third year to themselves, to inform themselves (amongst other things) how the archdeacons, their substitutes, performed their duties (*b*).

(*a*) God. Append. 7.
(*b*) Degge, p. 2, c. 15, John's. 151.

The archdeacon at first had, properly speaking, no jurisdiction ; but in progress of time he ceased to be the mere delegate of the bishop, and attained a substantial jurisdiction (being himself an ordinary and not simply acting as the vicar-general by the bishop's delegated power) ; but the office is clearly an emanation from the episcopal authority ; and its use is to carry out into the detail of cases the bishop's office and care ; not regarding merely the fabric of the church, or its external possessions and endowments alone, but taking cognizance of persons as well as things, and bearing on all points which are not of necessity limited to the episcopate, its portion of the bishop's spiritual charges (*c*).

The churchwardens are obliged twice every year (*d*), *i. e.*, at these visitations of the bishop, archdeacon, or other ordinary, to make their presentments according to the articles given to them for that purpose (*e*), of all such things as are amiss in their parishes, and may, if they think fit, do it oftener, as there shall be an occasion ; but cannot be forced thereto, unless only when the bishop visits (*f*).

At the Easter visitation, when the churchwardens go out of their office, they must take care to make these presentments before the new churchwardens are admitted. For after the new ones are admitted, the old ones are out of their office, and therefore can have no right to present as churchwardens (*g*).

(*c*) Archdeacon *Wilberforce's* Charge, pp. 4, 5.

(*d*) *Id est*, where it hath been used to have two visitations in the year, but generally there is but one, Can. 116.

(*e*) See *ante*, p. 45, and *post*, Appendix, p. lxviii. These articles are by Can. 119, to be supplied to the churchwardens by the archdeacon or other ordinary, when they make their solemn declaration ; and by the bishop, when he summons his visitation.

(*f*) Can. 116, 117; Prid. 2.

(*g*) Prid. 136; Can. 118.

They are bound to present, not only from their own knowledge, but also from common fame; so that if there be a common fame in the parish of any one that he lives incontinently, is a common swearer, or in any other particular contained in the articles is a breaker of the laws of the Church, the churchwardens are bound to present him at the next visitation, that inquiry may be made thereinto; and they are guilty of the breach of their oath whenever they omit it (*a*) (*b*).

In case the churchwardens omit to present any of those particulars, of which there is such a common fame in their parish, they may be forced to do it by the ordinary in his visitation, on his having notice of the thing; and if they refuse so to do, may be proceeded against as wilful breakers of their oath (*b*), and in the interim be barred the communion by the minister of the parish (*a*).

As it is the duty of the minister, so also it is of every good Christian, to advise the churchwardens of what is amiss in their respective parishes, and to admonish and excite them to present the same; and every parishioner hath a right so to do, that so every scandal, which gives them offence, may be removed. And the churchwardens are bound to have regard hereto, and present whatever upon any such information or advices, either of the minister or parishioners, they shall find to be of ill fame in their parishes; and if they neglect or refuse so to do, they are liable to the same penalty as when they refuse to do it on the admonition of the ordinary (*c*).

But here the churchwardens must be advised to have a care that they do not turn the groundless calumnies and base slanders which wicked and malicious persons are too

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(*a*) Prid. 3.

(*b*) Or rather since 5 & 6 Will. 4, c. 62, s. 9, of their solemn declaration. See *ante*, p. .

(*c*) Prid. 4.

apt to raise of their neighbours, into formal accusations against them; but take heed that they present no other ill fame of any one, but such only as there is that just ground for as may make it credited and believed by honest and good men (*d*).

The churchwardens are also in strictness to present all such as, without lawful or reasonable excuse, absent themselves from church on Sundays and holidays (*e*), except, perhaps, such dissenters as usually attend some place of worship other than those of the Established Church (*f*).

And because such times as are devoted to the service and worship of God ought not to be profaned by being employed to any other work; but all ought then to exercise themselves in the duties of piety and religion, both publicly and privately; the churchwardens are to see that all such times be duly observed, especially the Lord's Day, which hath by God himself been consecrated to his worship from the beginning of the world; and if any offend herein, they are are to be presented by the churchwardens at the next visitation, or they may in certain cases be summarily convicted before a justice of the peace, and the penalties applied to the relief of the poor of the parish in which the offence shall be committed (*g*).

(*d*) Prid. 5.

(*e*) Can. 90.

(*f*) 1 & 2 Will. & M. c. 18; 52 Geo. 3, c. 155; 15 & 16 Vict. c. 36; 18 & 19 Vict. c. 81; 19 & 20 Vict. c. 59.

(*g*) See Prid. 14, and 29 Car. 2, c. 7, "An Act for the better observance of the Lord's Day, commonly called Sunday." But see also "The Sunday Observation Act, 1871" (34 & 35 Vict. c. 87), whereby the consent in writing of the chief officer of police of the police district in which the offence is committed, or of two justices of the peace, or a stipendiary magistrate having jurisdiction in the place where the offence is committed, is made necessary to authorize proceedings under the Act of Car. 2. The statute of Victoria was to continue in force until the 1st day of September, 1872; but it is annually renewed by the Expiring Laws Continuance Acts.

The churchwardens are also to present all breaches and neglect of duty in their minister (*a*).

Thus they are to make presentment if the church be not in all respects regularly served according to the good rules and orders of the Church of England, that is, if there be not on all Sundays morning and evening prayer duly and devoutly read, and on all holy days morning prayer at least, where a congregation can be gotten together for the same (*b*), and if there be not a sermon at least once every Sunday (*c*) and catechising of youth on the other part of the day (*d*) ; if the sick be not duly visited (*e*), the dead regularly buried (*f*), and the sacraments faithfully adminis-

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(*a*) By 3 & 4 Vict. c. 86, *An Act for the better enforcing Church Discipline*, all criminal proceedings against a clerk in holy orders for any offences against the laws ecclesiastical are to be carried on according to the provisions of that statute; but this does not at all affect the duty of the churchwardens to *present* their minister if he offend against those laws. On the construction of this Act, see *The Dean of York's case*, 2 Q. B. 1; *Saunders* v. *Head*, 3 Curt. 32; 2 N. E. C. 355; *Head* v. *Saunders*, 4 Moore, 186; 2 N. E. C. 364, S. C.; *Titchmarsh* v. *Chapman*, 3 Cur. 703; 1 D. & L. 732; 13 L. J. Q. B. 59; *R.* v. *The Bishop of Chichester*, 29 L. J. Q. B. 23; *Denison* v. *Ditcher*, 5 Week. Rep. 167; ex parte *Denison*, 4 E. & B. 292; *Ditcher* v. *Denison*, 11 Moore, P. C. 324; *Flamank* v. *Simpson*, 36 L. J. Ecc. 41; Ad. & Ecc. (L. R.) 276; *Mounsey* v. *Robinson*, 37 L. J. Ecc. 8; *Bishop of Norwich* v. *Pearce*, 37 L. J. Ecc. 90; *Moss* v. *Edwards*, 37 L. J. Ecc. 89; ex parte *Edwards*, 9 Ch. Ap. (L. R.) 138.

(*b*) Prid. 20; Can. 14; *Pullen* v. *Cleaver*, 2 Hagg. E. R. Append. 1 *Bennett* v. *Bonaker*, 2 Hagg. E. R. 25; *Burgoyne* v. *Free*, D. D., 2 Hagg. E. R. 456. That no action at law lies for refusing to celebrate divine service, see *Williams's case*, 5 Coke, 72 (*b*); as to whether an action lies against a clergyman for refusing to perform the marriage ceremony, see *Davis* v. *Black*, 1 Q. B. 900; and as to his liability to an action at law for refusing to administer the sacrament of the Lord's Supper, see *Clovell* v. *Cardinall*, 1 Sid. 34; *Henley* v. *Barstowe*, 1 Kel. 947.

(*c*) Prid. 20; Can. 45; rubric to the communion office.

(*d*) Prid. 20; Can. 59.

(*e*) *Ib.*, Can. 67.

(*f*) *Ib.*, Can. 68.

tered *i.e.*, the sacrament of the Lord's Supper at least three times every year (*g*), and that of baptism as often as there shall be occasion for the same (*h*).

It should be mentioned here that by a recent Act of parliament, 35 & 36 Vict. c. 36, which received the royal assent the 18th of July, 1872, it is enacted that from and after the passing of that Act it shall not be lawful for the minister, clerk in orders, parish clerk, vestry clerk, warden, or any other person to demand any fee or reward for the celebration of the Sacrament of Baptism, or for the registry thereof, with a proviso that the Act shall not apply to the present holder of any office who may at the passing of the Act be entitled by any Act of parliament to demand such fees.

Two other statutes should also be referred to here.

1. "The Prayer Book (Tables of Lessons) Act, 1871" (34 & 35 Vict. c. 37), by which fresh tables of Proper Lessons and a fresh table of daily first and second lessons are substituted for those hitherto in use, and power is given to the ordinary to alter the appointed psalms and lessons on all occasions whereon he shall judge that such alteration will conduce to edification. The statute contains a proviso that the table of lessons hitherto in legal use may at any time prior to the 1st of January, 1879 be followed in lieu of the table thereby substituted therefor.

2. "The Act of Uniformity Amendment Act, 1872"

(*g*) Prid. 20; Can. 21. Rubric at the end of the communion office. The language of Dr. *Prideaux* has been retained here; but it was well observed by the late Bishop of *London*, Dr. *Blomfield*, in one of his charges to the clergy of his diocese, that in order to give full effect to the rubric which requires *every* parishioner to communicate at the least three times in the year, whereof Easter to be one, the Holy Communion must be administered at least six times in the year.

(*h*) Prid. 28; Can. 58, 69.

(35 & 36 Vict. c. 35); whereby the use of a shortened form of morning and evening prayer on any day except Sunday, Christmas Day, Ash Wednesday, Good Friday, and Ascension Day, of special services for special occasions, and of additional forms of services on Sundays and holy days, the celebration of the order for morning prayer, the litany, and the order for the administration of the Lord's Supper as separate services, and the preaching of a sermon or lecture without the common prayer, or services appointed by the Book of Common Prayer being read before it is preached, so that it be preceded by any service authorized by this Act, or by the bidding prayer, or by a collect taken from the Book of Common Prayer with or without the Lord's Prayer, are authorized. This important statute, with its schedule, which contains the shortened forms of services authorized, will be found at length in the Appendix. See p. xxxii.

But it is proper here to subjoin that though the law requires full services from the minister of every parish that is, both forenoon and afternoon in every Lord's Day, yet this is not to be expected but where the benefice is a competent maintenance. Where the living is sufficient fully to maintain the minister there it is reasonable that the people should fully have his ministry; but where they can but half maintain him, they must be content with half his services, and allow him to employ the other half in serving some other cure, thereby to help out the other part of his subsistence (*a*).

(*a*) Prid. 21. The incumbent is bound by the common ecclesiastical law to perform or to provide for the performance of divine service in every consecrated church or chapel of the ecclesiastical parish or benefice of which he is the incumbent, though the extent to which he is bound to do this may depend upon the particular circumstances of the parish, see *Rugg* v. *The Bishop of Winchester*, 5 Moore, P. C. (N.S.) 313; 2 P. C. (L. R.) 223.

In the performance of these sacred offices of our Church the minister is bound to comply with the requirements of the Prayer Book (*b*), and to perform the several services entire, without diminution, addition, or alteration in any respect, excepting so far as a discretion may be given him in the matter by the rubrics themselves. In *Newberry* v. *Goodwin* (*c*), which was a suit against a clergyman for irregularities in reading the Holy Scriptures, and brawling in the church, Sir *John Nicholl* thus expresses himself upon the subject :—"The law directs that a clergyman is not to diminish in any respect, or to add to the prescribed form of worship ; uniformity in this respect is one of the leading and distinguishing principles of the Church of England ; nothing is left to the discretion and fancy of the individual. If every minister were to alter, omit, or add, according to his own taste, this uniformity would soon be destroyed, and though the alteration might begin with little things, yet it would soon extend itself to more important changes in the public worship of the Established Church, and even in the Scriptures themselves : — The most important passages might be materially altered under the notion of giving a more correct version, or omitted altogether, as unauthorized interpolations" (*d*).

And in the recent case of the Rev. *J. F. Todd*, which was a proceeding against a clergyman under the Church Discipline Act (3 & 4 Vict. c. 86), for purposely omitting in the burial of a deceased parishioner these important

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(*b*) That is, of course, subject to the provisions of "The Act of Uniformity Amendment Act, 1872," *supra*, p. 375, Appendix, p. xxxii.

(*c*) 1 Phil. 282.

(*d*) It is to be observed, however, that in *Newberry* v. *Goodwin*, there was no *charge* of mere addition, but only of omissions and alterations. See *R.* v. *Sparks*, 3 Mod. 78; 2 Shower, 447.

words of one of the prayers in the office of burial, "*as our hope is this our brother doth,*" we find the following beautiful passages illustrative of the same position, in the judgment of that most learned and excellent prelate, the late Bishop of *Exeter*, to whose judgment Mr. Todd had submitted himself under the authority of the 6th section of the Act.

"In looking at the nature of the offence thus acknowledged, it is impossible to shut our eyes to the too manifest intent with which the words above cited were omitted. It is plain and undeniable that they are omitted because the minister did not choose to give expression to the pious and charitable hope of the Church that the deceased Christian brother resteth in our Lord Jesus Christ, who is the resurrection and the life, and in whom unless he resteth, so as to be found in him at the last day, he hath perished everlastingly. This pious and charitable hope of the Church, I say, Mr. Todd knowingly and with premeditation refused to express; thereby intimating that it was not to be entertained in respect of the deceased, whose corpse he was then burying. And if there could otherwise be a doubt whether such an intimation was designed, that doubt would be removed by the matter alleged, whether in justification, or in excuse of the omission. Mr. Todd, it seems, had been informed, on what he considered unquestionable authority, that the deceased had died in a state of intoxication; in other words, in sin. That information, indeed, he admits that he subsequently found to have been erroneous; and because it was erroneous—because the deceased did not die in a state of intoxication—he has ingenuously and fully declared his sorrow for the pain which had been inflicted on the surviving relatives by his unhappy condemnation of the state of the soul of the deceased.

"This retraction, and the sorrow expressed by him, are

creditable to his candour ; but they are very far indeed from removing (in whatever degree they can be admitted as an extenuation of) his defence. For, ignorance of the fact, or rather belief through ignorance of an unreal fact, though that ignorance was the sole cause of the offence, cannot be allowed to excuse, if the fact itself, so believed through ignorance, be such as would, if real, not justify the conduct into which belief of it may have misled the party. Now, such is the case in the present instance. Even if the deceased had died in a state of intoxication, however his minister may have lamented it, however it may have impaired the hope of his being admitted to rest in Christ, yet it ought not, on just consideration of the terms of the Christian covenant, to have extinguished that hope, much less to have induced him to proclaim, or even to suggest the extinction of it. God, when he vouchsafes to regenerate by baptism, vouchsafes also to give forgiveness of all sins to those who continue in the state in which they have been placed by baptism. Presumptuous and unrepented sin does, indeed, forfeit that state ; but thanks be to God, not sins of infirmity,—and whether, in the case of death under intoxication, the sin was presumptuous and unrepented, or a sin of infirmity, consistent with a living, though it may be languid faith, it is not for man to pronounce. To hold the contrary—to assert for the priesthood a right to judge in every case of the final condition of the deceased, would be to claim a power of the keys above that to which papal Rome ever dared to aspire, and which this reformed Church, while it maintains the just authority of its priests for edification, not for destruction, hath always most strongly repudiated. Where would such a tyranny, if once endured, be content to stop ? By the same right—if it were a right—by which this clergyman took upon him to decide that this deceased died in a state of intoxication, and excluded

him, therefore, or seemed to have excluded him, from the hope of a Christian, he and every other clergyman might assume to judge of every other deceased, whether he died in any other sin, and was to be denounced, in the last solemn office over his mortal remains, as cut off from the body of Christ, and from the blessed inheritance of all who die in the Lord" (*a*).

Perhaps, with the single exception of the omission (now unhappily so common that the churchwardens can hardly be expected to notice it) of that portion of the communion service which is directed by the rubric to follow the sermon (*b*), the most frequent instances of alterations in, and curtailment of the services, are to be found in the substitution, at the will of the reader, of chapters from the canonical scriptures in lieu of the apocryphal lessons, which the Church in her wisdom has appointed to be read, "for example of life and instruction in manners:"(*c*) and in the unauthorized mutilation of the marriage service —irregularities which undoubtedly ought to be presented.

An instance, on the contrary, of unauthorized addition to the service is to be found in the practice of offering up a prayer in the pulpit before and after the sermon. This practice, like the far more censurable one above referred to, of omitting the offertory, is so very common that the churchwardens can scarcely be expected to present their minister for complying with it; but they should at the same time remember that "no prayer being prescribed or appointed either before or after the sermon, the minister who uses no prayer either before or after the sermon

(*a*) *Re Todd*, 3 N. E. C. *Supplement*, 52.

(*b*) "The weekly use of the offertory has my full approbation, and is clearly in accordance with the rubric." Per the late Bishop of *Exeter* in reply to a presentment by the churchwardens of St. Olave, Exeter, at his triennial visitation in 1857. See "The Times" for Saturday, May 9th, 1857.

(*c*) Article 6.

strictly conforms to the law of Church and State, and is therefore not open to any censure or discouragement from his bishop" (*d*).

(*d*) Per the late Bishop of *Exeter*, in giving judgment in the *Helston case*. See Best's *Helston case*, p. 61. If any prayer at all is used, it should be the bidding prayer, as directed by the 55th canon; but as this is not sanctioned by the rubric, and is apparently at variance with it, it seems that even the bidding prayer ought not to be used, except on those occasions, in which, as in our University churches, sermons are preached without a previous service. On such occasions, formerly not uncommon, (until the practice was forbidden by statute, except in our University churches, see 13 & 14 Car. 2, c. 4, ss. 22, 23; but which practice has recently been authorized by "the Act of Uniformity Amendment Act, 1872," *ante*, p. 375,) the bidding prayer, which is not in strictness a prayer at all, but rather an exhortation to the congregation for whom and what to pray, is peculiarly applicable; but it seems out of place when the congregation have already more than complied with its injunctions by joining in the various petitions of our beautiful and comprehensive liturgy. That it is no offence, however, to say a prayer not prescribed by the rubric before the sermon, see *R.* v. *Sparks*, 3 Mod. 78; 2 Shower, 447, where judgment against the defendant upon an indictment for using other prayers than those prescribed by the Book of Common Prayer was reversed, upon the ground (*Withers*, J., *hæsitante*) that the indictment did not allege that the other prayers were used instead of the common prayer, and that "it might have been a prayer before sermon, and so no offence." It seems that the indictment might otherwise have been sustained, either at the assizes, or at the sessions: see 1 Eliz. c. 2, ss. 6, 17; 23 Eliz. c. 1; 12 & 13 Car. 2, c. 4, s. 24; and see *Fleming's case*, 1 Leon. 295, where an indictment was sustained under 1 Eliz. c. 2, for giving the sacrament of baptism in other form than is prescribed in the said statute and in the Book of Common Prayer; and an anonymous case in Godb. 118, where an indictment was sustained under the same statute for baptizing a child without the sign of the cross. In a recent case before the Court for Crown Cases Reserved, *R.* v. *Moorhouse James*, 2 Den. C. C. 1; 19 L. J. M. C. 179, and more fully reported in *Temple and Mew*, p. 300, a question was raised as to whether a clergyman could be indicted for refusing to perform the marriage service; but the point was not decided, as no sufficient tender or demand to be married had been made. See further as to the duty of strict obedience to the directions of the rubric, the judgment of Dr. *Battersby*, V. G., in the Consistorial Court of *Dublin*, in the case of *The Office promoted by the Rev. Lancelot Dowdall* v. *Rev. James Hewitt*, 10 L. T. (N.S.) 823.

With regard to the rights of burial, it may be laid down, as a general rule, that every person is, of common right, entitled to be buried in the churchyard of the parish in which he died (*a*):—perhaps also, in that of the parish at which at the time of his death he was a resident inhabitant (*b*).

He is, at common law, entitled to this right without payment of any fee, and none can, in any case be demanded as a condition precedent to the burial (*c*), but a fee may be due by custom in a particular parish (*d*), either to the minister, or to the churchwardens, or to both (*e*), provided

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(*a*) Com. Dig. Cemetery (B); *R.* v. *Taylor*, Willes, 538 (n); S. C.; 7 Davy, 278, M.S.; *R.* v. *Coleridge*; 2 B. & A. 806; *R.* v. *Stewart and another*, 12 A. E. 773; 4 P. & D. 349, S. C.; Com. Dig. tit. (Cemetery). And see *R.* v. *Fox and others*, 2 Q. B. 246, where a *mandamus*, peremptory in the first instance, issued to compel a gaoler to deliver up the body of a deceased person to the executors in order that the same might be decently interred; and *R.* v. *Scott*, 2 Q. B. 248, where an indictment was sustained against the gaoler, for unlawfully detaining the body, and burying it without any rite of Christian burial in an unconsecrated place. See also *R.* v. *Cheere*, 4 B. & C. 902; *Jones* v. *Ashburnham*, 4 East, 465; *R.* v. *Lynn*, 3 T. R. 733.

(*b*) See Burn's Eccl. Law, by Phill. tit. "Burial." Cripps's "Laws of the Clergy," 5th edition, p. 778, where he says—"a parishioner dying out of his parish has a right to be buried where he dies; or if his relatives wish to remove him, that he has also a right to be buried in the churchyard of his own parish "*ubi decimas persolvebat vivus*," which was the rule of the Canon Law.

(*c*) Lind. 278; *Andrews* v. *Cawthorne*, Willes, 536; Steer's Parish Law, 54; *Gilbert* v. *Buzzard*, 3 Phill. 349. And see *Spry* v. *Gallop*, 16 M. & W. 716.

(*d*) *Andrews* v. *Cawthorne*, Willes, 536; *Spry* v. *Directors and Guardians of Marylebone*, 2 Curt. 5.

(*e*) See Anderdon on Churchwardens, 121; and see Per *Gibbs*. C. J., in *Littlewood* v. *Williams*, 6 Taunt. 277. That the custom must be immemorial and invariable (as indeed must be the case with all customs), see Per *Gibbs*, C. J., v. this case. In *Shepherd* v. *Payne*, 12 C. B. (N.S.) 414, 31 L. J. C. B. 297, the Court of *Common Pleas* held that a custom to pay a *reasonable* visitation

the burial has actually taken place in the parish (*f*) ; and, in practice, there is scarcely a parish in England in which

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fee was good, and that it need not be a fixed sum. This case was affirmed in error, see 16 C. B. (N.S.) 133 ; 33 L. J. C. B. 158, on the ground that the fair result of the evidence was that there had been an immemorial payment of a fixed sum. The Court of Error gave no opinion on the point decided by the court below, with the exception of Mr. Baron *Bramwell*, who said that he was perfectly satisfied with it.

(*f*) *Bordeaux* v. *Lancaster*, 1 Salk. 332 ; *Topsal* v. *Ferrers*, Hob. 157; *Patten* v. *Casleman*, 1 Lee, 387. But not otherwise, as it is against reason that a fee should be due where no service has been performed, *Ibid.*, and see *Spry* v. *Gallop*, supra. Where, however, the duty has been performed at a chapel of ease of any description, though by a perpetual curate or other permanent minister of such chapel, the incumbent of the parish will, at common law, and in the absence of express provision to the contrary, be the person entitled to the fee. *Spry* v. *Emperor*, 6 M. & W. 639; *Carr* v. *Mostyn*, 5 Exch. 66. But under the authority of the Church Building Acts provision is frequently made, by order in council, for the appropriation of the surplice fees for duties performed at the church or chapel of a district chapelry, consolidated chapelry, or particular district, between the incumbent of such church or chapel and the incumbent of the parish church in certain proportions. Where this has been done, or such fees otherwise belong to the incumbent of the original parish, the church building commissioners are authorized by a recent Act of parliament to award him compensation for the loss of any fees, dues, oblations or offerings arising within such chapelry or district, and to transfer such fees, &c., to the incumbent of the chapelry or district. See 14 & 15 Vict. c. 97, ss. 2, 3, 4, 5. And where the fees or any part thereof arising from the performance of the offices of the church or any of them are not reserved, or do not otherwise belong to the incumbent of the original parish or district out of which the district chapelry, consolidated chapelry, or particular district is taken, all the mortuary or other ecclesiastical fees, dues, oblations or offerings arising within such district chapelry, &c., are, under the provisions of the above-mentioned Act, to belong and be paid to the incumbent of such district chapelry, &c., notwithstanding no compensation for the loss thereof has been made to the incumbent of the original parish or district: see sect. 6. Where these fees are apportioned, the incumbent of the district church is not bound to enforce payment of them as the agent of the incumbent of the parish. If the latter insists upon his right, he must appoint a receiver to collect his share of the fees: *King* v.

fees are not in such case demanded and paid (*a*), although no authority of the vestry, or sanction of the ordinary—indeed nothing short of custom or an Act of parliament—can absolutely legalize such fees (*b*).

If the minister refuse his permission for the burial of the corpse, it may be enforced by *mandamus* (*c*); and he may also, in such case, be punished by criminal information or indictment, by reason of the temporal inconvenience arising from the non-interment of the corpse (*d*).

But the choice of the place rests entirely with the minister, and he and the churchwardens may exercise a discretion on the subject. Burial in a vault, or in a particular part of the churchyard, cannot be insisted upon (*e*), nor can a custom, whereby the parishioners

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Alston, 12 Q. B. 97. But if the incumbent of the district church actually receives the entire fees, the incumbent of the parish church may recover his share from him in an action for money had and received. *Ibid.* That the proper tribunal for the recovery of surplus fees is the *Ecclesiastical Court*, see also *Spry* v. *Gallop*, supra. See further as to the respective rights of the incumbents of the mother parish and the district: *Vaughan* v. *The South Metropolitan Cemetery Company*, 1 J. & H. 256; *Tuckniss* v. *Alexander*, 32 L. J. Ch. 794.

(*a*) See And. on Chw. 122.

(*b*) *Ibid.*, and see *Gilbert* v. *Buzzard and Bowyer*, 2 Hagg. C. R. 348, and the observations of *Gibbs*, J., in *Littlewood* v. *Williams*, 6 Taunt. 267, 1 March, 589, S. C., and of Sir *S. Lushington*, in *Varty and Mopsey* v. *Nunn*, 2 Curt. 877, 1 N. E. C. 191, S. C. If burial be required in a particular mode, calculated to bring additional charge and trouble upon the parish, as in a coffin of lead or of iron, a reasonable fee may in all cases be demanded, as a condition precedent to the burial: *Gilbert* v. *Buzzard and another*, supra. As to the rights of incumbents, clerks and sextons to fees for burials in cemeteries under the Burial Acts, see 15 & 16 Vict. c. 85, s. 32; 20 & 21 Vict. c. 81, s. 5; and see *Day* v. *Peacock*, *Cobb* v. *same*, *Bender* v. *same*, 18 C. B. (N.S.) 702; 34 L. J. Q. B. 225; *Cronshaw* v. *The Wigan Burial Board*, 8 Q. B. (L. R.), 217.

(*c*) *R.* v. *Coleridge*, 2 B. & A. 806.

(*d*) *R.* v. *Taylor*, Willes, 438 (n); 7 Davy, 278, S. C.

(*e*) Ex parte *Blackmore*, 1 B. & Ad. 122.

claim any such right, be supported (*f*) ; and no one can be buried in the chancel or the body of the church except by prescription to a right of burial claimed as appurtenant to a messuage (*g*), without the consent of him that hath the freehold, whether appropriator, impropriator, instituted rector, or vicar—at least the law is so laid down by Dr. *Prideaux* (*h*), who is supported in this view by the cases of *Francis* v. *Ley* (*i*) and *Day* v. *Beddingfield and another* (*k*)—it is submitted correctly, notwithstanding the observation of *Gibson* in his Codex (*l*), and of *Littledale*, J., in *Bryan* v. *Whistler* (*m*) ; though the consent of the spiritual incumbent *quâ spiritual* incumbent, as the proper judge of the fitness or unfitness of any particular person to

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(*f*) *Fryer* v. *Johnson*, 2 Willes, 28.

(*g*) *Waring* v. *Griffiths*, 1 Burr. 440; 2 Lord Raym. 183, S. C. But if the minister refuse burial in any such privileged vault, he will be liable to ecclesiastical censures. In *Nevill* v. *Baker, Clerk* (Arches), see "The Times" for Nov. 24, 1862, the defendant was suspended for three months, and condemned in costs, for refusing to bury the sister of the promoter in the family vault within the church. But the ordinary cannot compel him by ecclesiastical censure to perform the burial service, or any part thereof, on *unconsecrated* ground, even where such ground forms the only access to a vault under a *consecrated* church: *Rugg* v. *Kingsmill*, 5 Moore, P. C. (N.S.) 19; 2 Ad. & Ecc. (L. R.) 59. As to the regulations with reference to burial by the Towns Improvement Consolidation Act, see 10 & 11 Vict. c. 34, s. 103, and as to the regulations on this subject by the Public Health Act, see 11 & 12 Vict. c. 63, s. 82.

(*h*) Prid. 119, 120. In these cases a fee may be demanded by the person whose license is necessary; and unless controlled by custom, he may stand on his own price: Tyr. Prid. 129; *Dean and Chapter of Exeter's case*, 1 Salk. 334; *Nevill* v. *Bridger*, 9 Ex. 214; 43 L. J. Ex. 147; in which case it was decided that, if there is a special contract, he may sue for the amount in the temporal court. See this case more fully reported in 30 L. T. 690.

(*i*) Cro. Jac. 97.

(*k*) Noy. 104.

(*l*) Gib. Cod. 542.

(*m*) 8 B. & C. 288.

have the privilege of being buried in the church, may also be requisite (*a*), unless indeed the Ordinary should think fit to sanction the burial without it, which it is apprehended he would have power to do (*b*); and probably would do, if the incumbent insisted on an unreasonable fee (*c*).

The interference of the *Queen's Bench* in such cases is confined to enforcing the common law right of interment in the churchyard; when the mode of burial is in question, they will not interfere (*d*), nor will they compel the minister to read the burial service over the deceased (*e*); for these are matters purely of ecclesiastical cognizance.

(*a*) *Bryan* v. *Whistler*, 8 B. & C. 288, supra.

(*b*) See *Rich* v. *Bushnell*, 4 Hagg. 164, and see the judgment of *Willes*, J., in *Ashby* v. *Harris*, 3 C. P. (L. R.) 523.

(*c*) See *Rich* v. *Bushnell*, supra.

(*d*) *R.* v. *Coleridge*, 2 B. & A. 806; 1 Chitt. 588, S. C.

(*e*) *R.* v. *Taylor*, 7 Davy, 278, MS. Mr. Serjeant *Davy's* MSS. form part of the valuable MS. collection of the late Mr. Serjeant *Hill*, now in the possession of the Honourable Society of Lincoln's Inn: *R.* v. *Coleridge*, 2 B. & A. 806; 1 Chit. 588. The statement in the text is certainly the inference to be drawn from the language of the Court in *R.* v. *Taylor*, and of *Holroyd*, J., in *R.* v. *Coleridge*; whilst it would seem from the language of *Abbott*, C. J., in the latter case, that the learned judge thought that the Court would enforce not merely *interment* but *Christian burial*. The point has never been decided; but it was expressly raised in the case of Ex parte *Rumbold*, of which the author was kindly furnished with a note by the learned counsel engaged in it, the late Mr. *Cooke Evans*. It was an application made in the month of January, 1845, for a peremptory *mandamus* to compel the Rev. Mr. Chapman, vicar of Basingbourne, in the county of Cambridge, to bury the body of a child which had remained unburied since the 17th of February, 1840. Mr. *Chapman* refused to bury the child on the ground that it had been baptized by a dissenting teacher, and proceedings having been taken against him in the Court of *Arches*, which had failed, (*vide infra*, p. 388, n. (*g*),) this application was subsequently made. The learned counsel insisted that the Court of *Queen's Bench* had a concurrent jurisdiction with the *Ecclesiastical Court* in the matter, and that it would act in aid of the latter court by granting a

It is provided by the rubric that the office for the burial of the dead is not to be used for any that die unbaptized or excommunicate, or have laid violent hands upon themselves (*f*); but with these exceptions, the minister is bound to read the burial service over the corpse of every parishioner that is brought to the church or churchyard (convenient warning being given him thereof before); and if he refuse, he may be proceeded against in the *Ecclesiastical Courts*, and suspended from his ministry by the space of three months (*g*).

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mandamus, citing the *Bishop of Exeter's case* from Palmer's Reports, p. 51; *R.* v. *The Dean and Chapter of Trinity Chapel, Dublin*, 8 Mod. 17; Ex parte *Blackmore*, 1 B. & Ad. 122; and the language of *Abbott*, C. J., in *R.* v. *Coleridge*, supra, in support of this position. Mr. Justice *Coleridge* suggested that there might be a difficulty about the form of the rule; the application was for a *mandamus* to bury the child; but the real object of the parties was that he should read the burial service. Mr. *Evans* answered, that the law knew no difference between burial and Christian burial; to bury meant to inter with the Church service; the clergyman was not justified by law in placing any body in consecrated ground without the performance of the funeral rites:—it had been said by Sir *John Nicholl*, in his judgment given in the case of *Kemp* v. *Wicks*, 3 Phill. 264, *post*, p. 390, "Our Church knows of no such indecency as putting the body into consecrated ground without the service being at the same time performed." The Court then called upon Mr. *Evans* to explain why the application had been so long delayed, which he accounted for by stating that they had waited the result of the case of *Mastin* v. *Escott*, 2 Curt. 692, *post*, p. 390, and of the subsequent proceedings which had been taken on the authority of that case against Mr. *Chapman*. As it appeared that no demand to bury the child had been made since the judgment of the Court of *Arches* in the last-mentioned case, the Court said that a fresh demand ought to be made to bury the body, and if the vicar refused again, the application might be renewed. A fresh demand was in consequence made, and the child was thereupon duly buried with Christian rites by a friend of the vicar. A note of this motion, under the title of *R.* v. *Chapman*, will be found in the "Law Times," vol. 4, p. 332. The author is not aware of any other report of it.

(*f*) See the rubric for the office for the burial of the dead.

(*g*) Can. 68: *Kemp* v. *Wickes*, 3 Phill. 246; *Mastin* v. *Escott*,

Even where the friends of the deceased object to the funeral service being read, it is equally the duty of the clergyman to read it. Such at least were the instructions given by the late Bishop of London, Dr. Bloomfield, to a clergyman of his diocese. The Right Reverend Prelate is reported to have said,—"On no pretence whatever is it possible to abstain from performing the burial service over all persons buried in the usual consecrated ground; and further, it is your imperative duty to preserve the proper respect to the religious observance, and to exclude all improper persons not connected with the ceremonial" (*a*).

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2 Curt. 692; *Titchmarsh* v. *Chapman*, 3 Curt. 840; 3 N. E. C. 370, S. C.; *Nurse* v. *Henslowe*, 3 N. E. C. 272. Every fresh refusal is a fresh offence: *Titchmarsh* v. *Chapman*, 3 Curt. 703; 3 N. E. C. 370; 1 D. & L. 732; 13 L. J. Q. B. 59. But convenient warning must have been given a reasonable time *before* the corpse is brought to the churchyard, or no offence will have been committed: *Titchmarsh* v. *Chapman*, 1 Roberts, 173; 3 N. E. C. 370, S. C. That it is no answer to proceedings under this canon, that deceased died in a state of intoxication, see *Cooper* v. *Dodd*, 7 N. E. C. 514; and see *Todd's case*, supra, p. 377.

(*a*) The Author's only authority for this statement is the London Newspapers for Tuesday, March 13, 1855; but he sees no reason to doubt the substantial correctness of the statement, and has deemed the matter worthy of this short notice. The particulars will be found in the report of the proceedings at the Clerkenwell Police Court, before Mr. *Corrie*, the magistrate, against two Irishmen named *Lynch* and *Shea*, for interrupting the Rev. Dr. *Worthington* in the performance of the burial service. The learned magistrate, in imposing a fine on the defendants, stated that he was bound to concur in the decision of the right reverend prelate; and see *supra*, p. 386, n. (*e*). The question has also been raised in a recent case before certain justices of the peace at Basingstoke in Hampshire, a proceeding under 23 & 24 Vict. c. 32 against Mr. *Arthur Gooch Pigott* for having disturbed the Reverend *Alfred Barker*, Rector of the parish of Sherefield-on-Loddon in the performance of the office for the burial of the dead at the interment of the late lamented Baron *Pigott*, the father of the defendant. The defendant had in accordance with the views of the Plymouth Brethren, whom he stated his father

It may not be amiss in this place to direct attention to the sixth section of "The Compulsory Church Rate Abolition Act, 1868" (*b*), by which it is provided that nothing in that Act contained shall affect any right of burial to which the inhabitants of the district may be entitled in the churchyard of the mother church.

It has always been held that baptism, to be valid, must be administered with the proper matter—*water*, and in the proper form of words—*in the name of the* FATHER, *and of the* SON, *and of the* HOLY GHOST; but whether a person who has been rightly baptized, as regards the matter and form of the words, but by a dissenting teacher or other person not having received episcopal ordination, is an unbaptized person within the meaning of the rubric: or in other words, whether baptism by a layman is in the

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to have recently joined, requested the rector not to attend, and desired that the service should not be read. But the rector had deemed it his duty to attend for the purpose of performing the service. He was, however, disturbed in the discharge of this duty by the defendant, who caused the coffin to be lowered into the grave without the performance of the service. The defendant insisted that the performance of the burial service was a privilege which might be waived, and that as the executors and persons having control over the funeral had objected to it in this case, and Mr. *Barker* had been requested not to attend, he was not at the time in the discharge of his duty as a clergyman; that the Act does not mean ministering *de facto* only, but in pursuance of his duty; and that he had not been disturbed within the meaning of the Act. The justices convicted the defendant, but gave him leave to appeal. The author has been kindly assured by Mr. *Staveley Hill*, Q.C., M.P., the counsel engaged for the prosecution, that the above statement of the case is substantially correct.—See a report of the case in "The Times" and "The Standard" for June 3rd, 1875. That it is illegal for any one not lawfully authorized, to bury a corpse in consecrated ground, or to read or assist in reading the burial service in consecrated ground over a dead body, see *Johnson* v. *Friend and Ballard*, 6 Jur. (N.S.) 280. In this case the body of an unbaptised child had been forcibly buried in a parish churchyard, and the burial service read over the body by the offenders.

(*b*) 31 & 32 Vict. c. 109.

judgment of the Church of England, as recognized and regulated by the laws of the land, a nullity or only an irregularity, has been the subject of much controversy. In *Kemp* v. *Wicks* (*a*), Sir *John Nicholl* held such baptism to be valid; but this decision has been much questioned from time to time, and was subsequently brought under the review of the Court of *Arches* in *Mastin* v. *Escott* (*b*). This latter case was elaborately argued, and, in the course of the argument, a further distinction taken between baptism by a layman in communion with the church, and baptism by a layman in a state of schism, which does not appear to have been brought under the notice of Sir *John Nicholl*. Sir *Herbert Jenner Fust*, the judge of the Court, after full and mature deliberation, decided, in a profoundly learned judgment, wherein he reviews the history of baptism from the earliest days of the Church to the present time, that lay baptism is an irregularity only, and not a nullity. The learned judge added, that it had not been *shown* to his satisfaction that the party who baptized in that case (a Wesleyan teacher) was a schismatic or a heretic, and therefore it was unnecessary to inquire whether heretical or schismatical baptisms are or are not valid; at the same time he expressed a strong opinion in favour of their validity.

This case was afterwards taken by appeal before the *Judicial Committee* of the *Privy Council*, who affirmed the judgment of the Court of *Arches*, with costs (*c*).

In the subsequent case of *Titchmarsh* v. *Chapman* (*d*), in which the party baptizing was a teacher of that class of Protestant dissenters called Independents, it was expressly pleaded by the defendant that the baptism was schismatical

(*a*) 3 Phill. 264.
(*b*) 2 Curt. 692.
(*c*) *Escott* v. *Mastin*, 4 Moore 104; 1 N. E. C. 552, S. C.
(*d*) 3 Curt. 840; 3 N. E. C. 378, S. C.

and heretical; but Sir *Herbert Jenner Fust* held, in accordance with the opinion expressed by him in the previous case of *Mastin* v. *Escott*, that this circumstance did not affect the validity of the sacrament (*e*).

It is, however, observable that in all these cases the deceased were infants who had not arrived at years of discretion. The question, therefore, still remained whether an adult person was entitled to Christian burial according to the rites of the Church of England, who, having been baptized in heresy and schism, remained satisfied with such heretical and schismatical baptism to the day of his death, without seeking to ratify that baptism, and be admitted to the full communion of the Church, through the sacred rite of confirmation. This question was, amongst others, recently submitted to the decision of the late Bishop of Exeter in the celebrated *Helstone* case. The right reverend prelate determined that such person was not entitled to burial according to the rites of the Church of England, and there certainly are strong reasons for supporting this view from the language of the office for burial itself (*f*); at the same time it must be admitted that there

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(*e*) See also *Nurse* v. *Henslowe*, 3 N. E. C. 272, where the party baptising was a Primitive Methodist. It does not, however, appear to have been pleaded in this case, as in *Titchmarsh* v. *Chapman*, that the baptism was schismatical and heretical.—Sir *Herbert Jenner Fust*, in giving judgment, said: "It would be wise on the part of clergymen to recollect that in every case of this kind, where an opposition to the claim of a legal right by a large body of persons in the country is made, and that opposition is unsuccessful, as it almost always must be in these cases, they afford an additional triumph to persons who are seeking the downfall of the Established Church. An additional source of triumph is afforded in all such cases, where an unsuccessful opposition is made to a claim of legal rights.

(*f*) See Best's *Helston* case, 72. Another point decided by the bishop was, that the office for the visitation of the sick could not with propriety be used towards a schismatic. His lordship observed, "If this were otherwise doubtful, all doubt

is, to say the least, great difficulty in reconciling this decision with the principles laid down by the Court of *Arches* and the *Judicial Committee* of the *Privy Council* in the previous cases.

These observations do not, however, apply to that part of the office for the burial of the dead which is directed to be read in the Church; for the minister has, by the rubric, a discretion in this matter, and may either go before the corpse into the church, or proceed at once to the grave.

This discretion in the hands of a judicious clergyman may be made the means of salutary admonition to the living; for it will enable him to mark the sense of the Church upon the conduct of those whose lives have been sullied by acts of gross immorality, or spent in wilful disobedience to her lawful and spiritual authority; but the practice, prevalent in many large towns, of making the admission of the body into the church depend, not upon the character of the deceased, but upon the payment of a fee, cannot be too strongly deprecated.

A non-parishioner, dying out of the parish, has no right to be buried in the churchyard; and, if it is desired that he should be buried there, his executors must pay for that privilege, and comply with the customs of that particular parish where he is to be interred (*a*).

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would be removed by the terms of one of the prayers, 'preserve and continue this sick member *in the unity of the Church.*'" See the case, p. 68.

(*a*) Anderdon on Chw. 122. By 7 & 8 Geo. 4, c. 72, s. 2, it is enacted that if there be no burial ground in the ecclesiastical district formed under 58 Geo. 3, c. 45, the Act which authorizes the creation of separate parishes and district parishes respectively for ecclesiastical purposes, the bodies of persons dying within it may, until a burial ground shall be provided, be interred in the cemetery of the original parish church. See further as to cemeteries, &c., under the Church-building Acts, 58 Geo. 3, c. 45, s. 80; 59 Geo. 3, c. 134, ss. 22, 36, 37, 38, 39; 3 Geo. 4, c. 72, s. 26; 5 Geo. 4, c. 103, s. 15. As to burials in cemeteries generally, see 10 & 11 Vict. c. 65; as to burials within "the metropolitan

As the churchyard is the common burying place of the parishioners, they are the persons interested in the exclusion of strangers, and the consent of the churchwardens is therefore necessary for the burial of non-parishioners; if they think fit to grant permission, it seems that the minister alone cannot prevent such a practice, nor can he demand an unreasonable sum for his consent; but if the parishioners object they may put a stop to it, although the minister and churchwardens are willing to continue it (*b*).

The decent burial of dead human bodies cast on shore from the sea is secured by legislative enactment.

By 48 Geo. 3, c. 75, s. 1, it is enacted that the churchwardens and overseers of the parish in which any dead human body shall be found thrown or cast on shore from the sea, shall, upon notice given to them of the fact, cause the same to be forthwith removed to some convenient place, and with all convenient speed to be decently interred in the churchyard or burial ground of the parish, so that the expenses of such burial do not exceed the sum which at that time is allowed in such parish for the burial of any person buried at the expense of such parish.

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burial district," see "the Metropolitan Interment Act, 1850,' 13 & 14 Vict. c. 52, and the Act to amend the laws concerning the burial of dead in the metropolis, 15 & 16 Vict. c. 85. See also 16 & 17 Vict. c. 134; 20 & 21 Vict. c. 81; and 22 Vict. c. 1. And as to burials beyond the limits of the metropolis, see the three last-named Acts; also 17 & 18 Vict. c. 87; 18 & 19 Vict. c. 128; 23 & 24 Vict. c. 64; 25 & 26 Vict. c. 100; and 34 & 35 Vict. c. 33. That a cemetery under the Church-building Acts is not within the exception in 16 & 17 Vict. c. 134, s. 5, see *R.* v. *Maude and another, JJ. of Manchester*, 25 L. J. M. C. 45.

(*b*) This is the view taken by Mr. *Anderdon*, (see And. on Chw. 125,) on the authority of *Littlewood* v. *Williams*, 6 Taunt. 277; 1 Marsh. 589, S. C. but *quære*, whether the minister cannot absolutely forbid the burial of strangers as a tresspass upon his freehold? The easement enjoyed by the parishioners is a right of burial for *themselves;* it cannot extend to the burial of *strangers;* and see Burn's Eccl. Law, by Phill. vol. i. 258, 258 (*a*).

By sect. 2, the minister, parish clerk, and sexton are to perform their respective duties as at other funerals, receiving for the same, by way of compensation, such sums as are paid in cases of burial at the expense of the parish.

By sect. 3, it is provided, that if any person finding such body shall, within six hours, give notice thereof to some of the churchwardens or overseers, or cause such notice to be left at his or their place or places of abode, he shall receive 5*s.* for his trouble, that sum to be forthwith paid to the persons first giving such notice only; but no greater sum than 5*s.* is to be paid for any one notice, although there may be a greater number of such bodies than one.

By sect. 4, he is to forfeit 5*l.* if he omit to give such notice within six hours.

Sect. 5 directs all charges to be paid by the churchwardens and overseers, and sect. 6 provides for their reimbursement, by means of an order in writing upon the treasurer of the county, under the hands of a justice of the peace for the county or place in which the body shall have been buried.

Sect. 7 renders the churchwardens and overseers liable to a penalty of 5*l.*, if they neglect, within twelve hours after notice given, to take the necessary steps for the interment of the body; and sect. 10 provides for the levying of the penalties under this Act by distress warrant, under the hand and seal of any justice for the said county or place, with a power to appeal to the next general or quarter sessions which shall happen one month after the time of the said offence (*a*).

(*a*) As to who are bound to bury paupers dying in a parish, see *R.* v. *Stewart and another*, 12 A. & E. 773; 4 P. & D. 349, S. C. *R.* v. *Venn*, 21 L. J. M. C. 39; and see further, as to

With respect to baptism, it should be remembered that that holy sacrament is by the rubric to be administered upon Sundays and holy days before the congregation, either immediately after the second lesson at morning prayer, or else immediately after the second lesson at evening prayer, at the discretion of the minister; and if he baptize at any other time or place, except in cases of necessity, he is guilty of a contempt of ecclesiastical discipline, for which he ought to be presented (*b*).

The minister should also be presented, if he marry any persons clandestinely (*c*), or if he knowingly, or for want of reasonable caution, solemnize matrimony between persons neither of whom is resident in his parish, or without due publication of banns or license, or in any other manner than that prescribed by law (*d*).

It may be mentioned here that considerable controversy has taken place, and much doubt been expressed as to the proper time for the publication of banns in the morning. In the sealed Book of Common Prayer (1662), which it need scarcely be observed is the Prayer Book now in force

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the burial of paupers, 7 & 8 Vict. c. 101, s. 31, and 18 & 19 Vict. c. 79, s. 1, and see 15 & 16 Vict. c. 85, s. 49.

(*b*) See the rubrics to the ministration of public and private baptism of infants respectively. By the canon (81) this is to be done publicly at the *font*.

(*c*) Prid. 20.

(*d*) *Bennett* v. *Bonaker*, 2 Hagg. 25. *Wynn* v. *Davis and Weever*, 1 Curt. 69; Can. 62; 4 Geo. 4, c. 76. Rubric to the Office of Matrimony. And see *Voysey* v. *Martin*, Stephen's Ecclesiastical Statutes, 1993; and *Re the Rev. G. M. D'Arcy Irvine*, ibid, 1995. As to the respective rights and duties of the incumbents of mother parishes and of districts under the Church-building Acts with respect to the publication of banns and the solemnization of marriage, see *Fitzgerald* v. *Champneys*, 2 J. & H. 31; *Tuckness v. Alexander*, 32 L. J. Ch. 794. It was decided in the last case that where a license to marry at a particular church is in the proper form, the incumbent of such church is not only entitled, but compellable to perform the ceremony.

the rubric after the *Nicene* Creed directs that "then shall the banns of matrimony be published," and the rubric before the office of matrimony in the same book directs that "the banns of all that are to be married together must be published in the church three several Sundays or holy days, in the time of divine service, immediately before the sentences for the offertory" (*a*); while the statute 4 Geo. 4, c. 76 (*b*), following the language of the repealed statute, 26 Geo. 2, c. 33, provides that "all banns of matrimony shall be published upon three Sundays preceding the solemnization of marriage during the time of morning service, or during the time of evening service (if there shall be no morning service in such church or chapel upon the Sunday upon which such banns shall be published), immediately after the second lesson." In consequence of these statutes the modern practice has been to publish the banns not only at the evening service, but also at the morning service, immediately after the second lesson; but it has been contended, and with great show of reason, that this practice has arisen from a misconstruction of the statutes—that the words "immediately after the second lesson" apply only to the evening service, and that they were not intended to interfere, and do not interfere, with the direction of the rubric as to the publication of banns in morning service immediately before the sentences for the offertory. It should be added that in modern editions of the Prayer Book the printers have, apparently without authority, taken upon themselves to omit the direction in the rubric after the *Nicene* Creed as to the publication of banns, and to substitute an extract from the statutes in

(*a*) A clear proof that the offertory is an integral part of the communion service, and that it never ought to be omitted therefrom.

(*b*) Sect. 2.

the place of the authorised rubric prefixed to the office of matrimony in the sealed book.

But the minister will not have committed any offence cognizable by the Temporal Courts by celebrating in the church, without banns or license, the service of the solemnization of matrimony for those who may already have acquired the legal *status* of married persons by contracting marriage in the registrar's office, or in a dissenting chapel duly registered for the solemnization of marriages. This was decided by the late Baron *Alderson*, in the case of *R.* v. *Benson, Clerk*, which came before him at the summer assizes for the county of *Oxford*, in July, 1856. The learned and lamented judge said that it was clear the rev. defendant had committed no temporal offence—he might, perhaps, be liable to ecclesiastical censures, but the question was one for the jurisdiction of the bishop, and not a case to be brought into a temporal court of justice (*c*).

Since this case was decided it has been enacted that, "If the parties to any marriage contracted at the registry office of any district" (conformably to the Marriage and Registration Acts), "shall desire to add the religious ceremony ordained or used by the church or persuasion of which such parties shall be members to the marriage so contracted, it shall be competent for them to present themselves for that purpose to a clergyman or a minister of the church or persuasion of which such parties shall be members, having given notice to such clergyman or minister of their intention so to do; and such clergyman or minister, upon the production of their certificate of marriage before the super-

(*c*) Mr. *Benson* had celebrated the marriage service after a marriage contracted in the registrar's office; but the reasoning of the learned judge is equally applicable to the case of a marriage contracted in a dissenting meeting-house.

intendent registrar, and upon the payment of the customary fees (if any), may, if he shall see fit, in the church or chapel whereof he is the regular minister, by himself or by some minister nominated by him, read or celebrate the marriage service of the persuasion to which such minister shall belong. Provided always, that no minister of religion who is not in holy orders of the United Church of England and Ireland, shall, under the provisions of this Act, officiate in any church or chapel of the United Church of England and Ireland ; but nothing in the reading or celebration of such service shall be held to supersede or invalidate any marriage so previously contracted, nor shall such reading or celebration be entered as a marriage among the marriages in the parish register. Provided also, that at no marriage solemnized at the registry office of any district shall any religious service be used at such registry office" (*a*).

This enactment would undoubtedly have the effect of exempting the minister from ecclesiastical censures (supposing him to have been otherwise liable to them)—where the previous marriage had been contracted in the registry office —but it is silent on the subject of the celebration of the marriage service in the church after a marriage contracted in a dissenting chapel ; and as it is by no means clear that the minister who celebrates the marriage service under such circumstances would not have incurred ecclesiastical censures, it will be the duty of the churchwardens to present him for so acting.

In the above-mentioned case of *R.* v. *Benson, Clerk*, Mr. Baron *Alderson* expressed a strong opinion that every woman who had been delivered of a child had a right to be churched, and ought to give thanks to God for her safe

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(*a*) 19 & 20 Vict. c. 119, s. 12.

deliverance. This opinion, whether right or wrong, is entitled to the greatest respect ; and it would undoubtedly be the duty of the churchwardens to present their minister if he refused to church a woman because she had not been married, or because her child was not legitimate.

The minister should also be presented if he refuse to use the common prayers, or to minister the sacraments in such order and form as are prescribed by the Book of Common Prayer (*b*) ; or if he use, wilfully and obstinately standing in the same, any other rite, ceremony, order, form or manner of celebrating the sacraments, matins, evensong or other open prayers than is mentioned and set forth in the said book (*c*) ; as, for example, if during the celebration of the office for the holy communion he use lighted candles upon the holy table ceremonially, and not merely for the purpose of giving light (*d*), or if during that time he use incense ceremonially (*e*), or if during the prayer of consecration he

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(*b*) 2 & 3 Ed. 6, c. 1, s. 2; 1 Eliz. c. 2, s. 2; 13 & 14 Car. 2, c. 4, s. 24.

(*c*) *Ib.*, and see *Martin* v. *Mackonochie*, 36 L. J. Ecc. 25.

(*d*) *Martin* v. *Mackonochie* (P. C.) 5 Moore, P. C. (N.S.) 500; 2 P. C. (L. R.) 365; 38 L. J. Ecc. 1, and see *Sumner* v. *Wix*, 3 Ad. & Ecc. (L. R.) 58, in which case the candles were placed on a ledge or shelf over the holy table, called a re-table, and also in large candlesticks on either side of it, and lighted candles were held on each side of the priest whilst he was reading the Gospel. That it is equally illegal to use lighted candles ceremonially at the morning prayer or any other service, and that lighted candles on the communion table or the re-table, if such candles are not wanted for the purpose of giving light, will be deemed to have been used ceremonially, and not merely as "a permissible decoration" or "an inexpressive act," see *Martin* v. *Mackonochie* (second suit), 4 Ad. & Ecc. (L. R.) 279.

(*e*) *Martin* v. *Mackonochie*, P. C. supra, and see *Sumner* v. *Wix*, supra, in which case the incense was used immediately before, but so as to be preparatory or subsidiary to the celebration of the holy communion.

elevate the paten or the cup above his head (*a*), or kneel or prostrate himself *before the consecrated elements* (*b*); or, if during that time (*c*), or when reading the collects next before the epistle in the communion service, or the collects following the creed or the epistle (*d*), he stand before the holy table with his back to the people; or if he mix water with the wine during the celebration (*e*), or use thereat wine

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(*a*) *Martin* v. *Mackonochie* (Arches), 2 Ad. & Ec. (L. R.) 116; 37 L. J. E. 17. The charge against Mr. *Mackonochie* was that of elevating above the head; but in a subsequent stage of the cause the *Judicial Committee* of the *Privy Council* said that it should be distinctly understood that they gave no sanction whatever to a notion that any elevation whatever of the elements, as distinguished from the mere act of removing them from the table and taking them into the hand of the minister, is sanctioned by law. See *Martin* v. *Mackonochie*, 6 Moore, P. C. (N.S.) 274; 3 P. C. (L. R.) 52; 39 L. J. Ecc. 11. In the second *Mackonochie case*, 4 Ad. & Ecc. (L. R.) 279, one of the charges was that the reverend defendant had elevated in an unauthorized manner and in a much greater degree than was necessary for the purpose of complying with any of the rubrics, or requirements of the Book of Common Prayer and of the communion service; but there was a conflict of evidence on this article, and the learned Dean of *Arches* adjudged that it was not proved.

(*b*) *Martin* v. *Mackonochie*, 5 Moore, P. C. (N.S.), 2 P. C. (L. R.); 38 L. J. Ecc. *supra*. In a subsequent stage of the cause before the *Judicial Committee* their lordships held that bending the knee, though it touch the ground but momentarily, or indeed not at all, is kneeling. See the case in 6 Moore, P. C. (N. S.) 274; 3 P. C. (L. R.) 52; 39 L. J. Ecc. 11, and in a still subsequent stage, that elevating the bread without the paten is equivalent to an elevation of the paten; that to elevate any part of the cup above the head is to elevate the cup above the head; that it is unlawful to elevate the elements at any time during the administration of the holy communion, referring to the 28th Article of religion as prohibiting all elevation of the elements—and that bowing the head down towards the holy table, until it nearly touch it, and assuming that posture for some seconds, although without any bending of the knee, is not mere bowing, but prostration, 7 Moore, P. C. (N.S.) 239; 3 P. C. (L. R.) 409.

(*c*) *Hebbert* v. *Purchas*, 7 Moore, P. C. (N.S.) 468; 3 P. C. (L. R.) 605.

(*d*) *Elphinstone* v. *Purchas*, 3 Ad. & Ecc. (L. R.) 67; 39 L. J. Ecc. 25.

(*e*) *Martin* v. *Mackonochie* (Arches), supra.

previously mixed with water (*f*), or wafer bread instead of such bread as is usual to be eaten (*g*); or if he use crucifixes or images ceremonially during divine service (*h*).

Indeed, the principle that no addition can be permitted to the rites and ceremonies ordered by the Book of Common Prayer, and that the performance during divine service of any ceremony not prescribed by the Book of Common Prayer is unlawful, has been carried to such an extent that processions round the interior of a church immediately before the commencement of morning or evening service, or immediately after the conclusion of morning or evening service, so conducted as to constitute a rite or ceremony in connection with the service, have been pronounced illegal (*i*).

The minister should also be presented, if, during the celebration of the holy communion, he wear, or sanction the wearing by other officiating ministers, a chasuble, dalmatic, tunic or tunicle, or alb (*k*); or if, in saying the public prayers or ministering the sacraments, or any of the rites of the church, he wear a cope, a black gown (*l*), or any other vestment than the surplice, which is the only vestment prescribed by the 54th canon, and which according to the last decision of the *Judicial Committee* of the

(*f*) *Hebbert* v. *Purchas*, supra.
(*g*) *Hebbert* v. *Purchas*, supra.
(*h*) *Elphinstone* v. *Purchas*, supra.
(*i*) *Elphinstone* v. *Purchas*, supra. And see *Martin* v. *Mackonochie* (second suit), 4 Ad. & Ecc. (L. R.) 279.
(*k*) *Hebbert* v. *Purchas*, supra.
(*l*) It is clearly illegal for the minister to wear the black gown whilst preaching the ordinary morning sermon, which is part of the communion service. Indeed this was laid down many years ago, in the *Helston case*, by the late Bishop of *Exeter*, who said that the surplice was the proper habit to be worn, unless indeed the parish should provide for the minister a white alb with a vestment or cope, in which case—(the Right Reverend Prelate relied upon the ornaments' rubric)—it would be his duty to wear them at the communion service. See Best's *Helston* case, p. 56.

Privy Council in matters of ritual (*Hebbert* v. *Purchas*), is the "only vestment of the parochial clergy," although "the cope," as laid down by the same authority, "is to be worn in ministering the holy communion on high feast days in cathedral and collegiate churches" in accordance with the provision of the 24th canon.

Sir *Robert Phillimore* had indeed already decided in this case (*a*) that the surplice was the only lawful vestment for the parochial clergy, except at the communion service. But having regard to the plain words of the ornaments' rubric, and to the language of the *Judicial Committee* of the *Privy Council* in *Liddell* v. *Westerton* (*b*), in which their lordships said, "The rubric to the Prayer Book of January the first, 1604, adopts the language of the rubric of Elizabeth;—the rubric to the present Prayer Book adopts the language of the statute of Elizabeth: but they all obviously mean the same thing, that the same *dresses* and the same utensils or articles which were used under," that is, *prescribed by*, "the first Prayer Book of Edward VI., may still be used," and in *Martin* v. *Mackonochie* (*c*), in which they emphatically approved the construction of the ornaments' rubric in *Liddell* v. *Westerton*, and said that "the term *ornaments* in the rubric means the articles, the use of which, in the services and ministrations of the church, is prescribed by that Prayer Book," he considered himself obliged to pronounce that the ornaments of the minister mentioned in the first Prayer Book of Edward VI. were those to which

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(*a*) *Elphinstone* v. *Purchas*, 3 Ad. & Ecc. (L. R.) 66. On the death of Col. *Elphinstone*, the original promoter of the suit, Mr. *Hebbert* was substituted as promoter, and the appeal prosecuted in his name.

(*b*) See *Moore's* special report, p. 159; *Bayford's* report, p. 113.

(*c*) 5 Moore, P. C. (N.S.); 2 P. C. (L. R.); 38 L. J. Ecc., *supra*.

the present rubric referred, and that he could not, therefore, pass any ecclesiastical censure against Mr. *Purchas* for using the cope, vestment or chasuble, alb and tunicle, in the office for the administration of the holy communion.

The following articles of dress were pronounced unlawful by Sir *R. Phillimore* in this case: albs with patches called apparels, tippets of a circular form, stoles, dalmatics and maniples—also copes, except at the communion service.

The lawfulness of using the girdle and the amice was also raised in this case, and as these articles of dress are not prescribed by the first Prayer Book of Edward VI., there can be no doubt that Dr. *Phillimore* would have pronounced against their lawfulness if it had been necessary for him to adjudicate on the point; but he held that it was not proved that Mr. *Purchas* had worn them, or suffered them to be worn.

But he sanctioned the use of the cap, called a "biretta" (*d*) and in *Hebbert* v. *Purchas* (*e*) the *Judicial Committee* said, "with respect to the cap called biretta, which the defendant is said to have carried in his hands, but not to have worn in church, their lordships would not be justified, upon the evidence before them, in pronouncing that the defendant did an unlawful act."

The learned judge of the Court of *Arches* also pronounced the following practices to be lawful: the placing of flowers on the holy table as decorations (*f*), the use of wine mixed with water at the holy communion, provided the wine and water be not mixed at the time of the celebration, so as to constitute a new rite or ceremony—the use of wafer bread,

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(*d*) And see *Martin* v. *Mackonochie* (second suit), 4 Ad. & Ecc. (L. R.) 279, in which the same learned judge stated that the wearing of the biretta was not illegal.

(*e*) 7 Moore, P. C. (N.S.) 468; 2 P. C. (L. R.) 605.

(*f*) *Ante*, p. 63.

provided it be broken by the priest—the standing by the priest during the prayer of consecration between the people and the holy table with his back to the people. The question of the legality of the last-named practice appeared to him to have been settled by the *Judicial Committee* in the case of *Martin* v. *Mackonochie* (*a*), who in their judgment say:—

"The rubric before the prayer of consecration then follows, and is in these words:"—

"When the priest, standing before the table, hath so ordered the bread and wine that he may with the more readiness and decency break the bread before the people, and take the cup into his hands, he shall say the prayer of consecration, as follows."

"Their lordships entertain no doubt on the construction of the rubric that the priest is intended to continue in one posture during the prayer, and not to change from standing to kneeling, or *vice versâ*; and it appears to them equally certain that the priest is intended to stand and not to kneel. They think that the words *standing before the table* apply to the whole sentence; and they think that this is made more apparent by the consideration that acts are to be done by the priest before the people, as the prayer proceeds (such as taking the paten and chalice into his hands, breaking the bread, and laying his hand on the various vessels), which could only be done in the attitude of standing."

As has been already intimated all these practices—except the placing of flowers on the holy table, the legality of which was not before them—were pronounced illegal by

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(*a*) 5 Moore, P. C. (N. S.) 500; 2 P. C. (L. R.) 365; 38 L. J. Ecc. 1.

the *Judicial Committee* of the *Privy Council* in the last ritual case before them, *Hebbert* v. *Purchas* (*b*).

It should be further stated that Dr. *Phillimore* in the case of *Elphinstone* v. *Purchas* (*c*), refused to admit to proof an article which charged that the defendant during the communion service, when reading the prayer for the whole state of Christ's Church militant here on earth, made a considerable unnecessary and unusual pause of about half a minute after pronouncing the words "departed this life in thy faith and fear," and made such pause not accidentally, or from any infirmity, but of set purpose and habitually, on the ground that the charge contained in it did not constitute a charge for which a clerk could be made criminally answerable in an ecclesiastical court. And there can be no reasonable doubt that he would, in like manner, and for the same reason, refuse to admit to proof an article which charged a clerk with having (as is the reverent practice of some celebrants) intentionally made a similar pause during the consecration prayer in the communion service immediately after the words, "Take eat, this is my body which is given for you: Do this in remembrance of me."

On the other hand Dr. *Phillimore* in the same case pronounced the following practices by the officiating minister to be unauthorised by the Book of Common Prayer and illegal:—

1. Causing the prayer or hymn called the "Agnus," that is to say "Oh, Lamb of God, that takest away the sins of

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(*b*) 7 Moore, P. C. (N.S.) 468; 3 P. C. (L. R.) 605. For the reasons which determined their judgment, and especially for the explanation of the apparent contradictions between this judgment and their previous judgments above referred to, the reader is referred to their learned and elaborate judgment in the case.

(*c*) 3 Ad. and Ecc. (L. R.) 66.

the world, have mercy upon us," to be said or sung before the reception of the elements, and immediately after the prayer of consecration in the communion service ; the said hymn or prayer being by the Prayer Book appointed to be said only at the conclusion of the communion service, and immediately before the final blessing (*a*).

2. The making, otherwise than in the appointed place in the office of baptism, of the sign of the cross ceremonially, and as part of the performance of divine service (*b*).

3. The kissing ceremonially of the book from which he reads the Gospel (*c*).

4. Giving notice during divine service of an intended mortuary celebration for the repose of a deceased person, and offering up a prayer for the repose of the soul of such person during divine service (*d*).

5. Announcing the celebration of the holy communion as "a high celebration of the Holy Eucharist."

6. Giving notice of holy days, other than those which the Church has directed to be observed, and which are to be found after the preface in the Prayer Book under the head "a table of all the feasts that are to be observed in the Church of England throughout the year."

(*a*) And see the second *Mackonochie case*, 4 Ad. & Ecc. (L. R.) 279.

(*b*) And see the second *Mackonochie case*, supra. That the minister may, however, cross himself as a matter of private devotion, such act not amounting to the introduction of a new right or ceremony to the congregation, but rather being one of the same character as crossing the hands over the breast, or spreading them out, or lifting them up, which could not reasonably be contended to be an ecclesiastical offence, see the judgment of Sir *R. Phillimore* in the last-named case, *supra.*

(*c*) And see the second *Mackonochie case*, supra.

(*d*) That prayers for the souls of the departed, though discontinued in her public services, are not prohibited by any law or canon of our Church, see *Breeks* v. *Woolfrey*, 1 Curt. 880, *ante* p. 366.

There were in this case of *Elphinstone* v. *Purchas* (*e*) several other charges against the reverend defendant of the use of unlawful ritual and of unlawful ornaments, which it is not thought necessary to set forth here, and for the particulars whereof the churchwardens are referred to the report of the case.

But it may be stated, generally, that it would seem to follow, as the result of the cases, that the minister ought to be presented, if, in the celebration of the services of the Church, he use any form of words, or do any act ceremonially, which is not prescribed expressly or impliedly by the Prayer Book; or if he use any *ornament* within the meaning of the ornaments' rubric, that is, any article whatever IN THE SERVICES AND MINISTRATIONS OF THE CHURCH, which is not either prescribed by the Prayer Book of Edward VI., or by the present Book, or, if not expressly prescribed, consistent with and subsidiary to the services, as an organ for the singing, a credence table from which to take the sacramental bread and wine, cushions, hassocks, &c. (*f*).

It should be observed here that in all these cases in which any gesture or other act, or the use of any particular article has been pronounced illegal, the fact that such act was done, or such article used *ceremonially*, has been treated as constituting the essence of the offence. In further illustration of this position, the instances in *Elphinstone* v. *Purchas* (*g*) of the crucifix, which was placed and kept on the re-table during the celebration of the holy communion, of the modelled figure of the infant Saviour with

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(*e*) 3 Ad. & Ecc. (L. R.) 66.

(*f*) See especially *Martin* v. *Mackonochie*, 2 P. C. (L. R.) 365; see p. 390.

(*g*) 3 Ad. & Ecc. (L. R.) 66.

two lilies on either side, which was placed on a shelf above the credence table during the midnight celebration of the holy communion on Christmas Eve, and of the figure or stuffed skin of a dove in a flying attitude, which was suspended over the holy table during divine service on Whit Sunday, may be referred to. It was expressly alleged in the articles that this crucifix was *not a part of the architectural decorations of the church*, and that all these things had been used *ceremonially;* and the judgment of Dr. *Phillimore* is based entirely upon the fact that they were so used. On the subject of the crucifix his judgment is as follows:—"I think I am bound to conclude from the evidence before me, unimpeached as it is by any other testimony, and in the absence of any explanation, that the crucifix has been introduced into or connected with the performance of the services prescribed by the Prayer Book, so as to constitute an additional right or ceremony; and I must admonish Mr. *Purchas* to abstain from the practice complained of in these articles." Whilst his judgment in respect of the modelled figure of the infant Saviour and of the figure of the dove is as follows:—"I think the result of the evidence is that these figures, having regard to the time and the services during which they were brought in and removed, being also emblematical in their character, were ceremonially used upon the occasions referred to, and that according to the judgment in *Martin* v. *Mackonochie* they were therefore illegal. It is very possible, however, that these things, perfectly innocent in themselves, were in fact not so used as to fall under the prohibition which attaches to the introduction of new ceremonies; and that if an explanation had been offered, or other evidence adduced by the defendant, I might have arrived at the conclusion that the things in question belonged merely to the category of what the *Privy Council*

have termed 'inert' decorations, and were not actively used in the service, in which case, as at present advised, I should not have pronounced them illegal."

Before leaving this part of the subject, it may be well to mention that in the second *Mackonochie case* (*a*) an attempt was made to induce Sir *R. Phillimore* to allow the question of the legality of the use of the vestments prescribed by the first prayer of Edward VI., of the position of the celebrant at the holy table during the consecration prayer, and of the use of wafer bread at the holy communion, on all which matters the judgment of Dr. *Phillimore* in *Elphinstone* v. *Purchas* (*b*) had been reversed by the *Judicial Committee* of the *Privy Council* in *Hebbert* v. *Purchas* (*c*), to be re-argued, on the ground that Mr. *Purchas* had not appeared by counsel, and that the *Judicial Committee* had not had the benefit of hearing the case argued on behalf of the defendant. But the learned judge declined to allow this to be done. He said, "In these peculiar circumstances it would be competent, I think, to this Court to allow these questions to be re-argued before it, more especially as it appears to me that the judgment of the *Appellate Court* in *Hebbert* v. *Purchas* (*c*), as to the ornaments of the minister, is irreconcilable with the former judgment of the same tribunal in *Liddell* v. *Westerton* (*d*), and with respect to the position of the minister, irreconcilable with the former judgment in *Martin* v. *Mackonochie* (*e*) ; and because with respect to the use of wafer bread, I think it probable that if their Lordships had not been deprived of the usual assistance of counsel, they would have arrived at a different

(*a*) *Martin* v. *Mackonochie* (second suit), 4 Ad. & Ecc. 279.
(*b*) 3 Ad. & Ecc. (L. R.) 66.
(*c*) 7 Moore, P. C. (N. S.) 468; 3 P. C. (L. R.) 605, *ante*, pp. 65, 404.
(*d*) Special Report by Moore.
(*e*) 2 P. C. (L. R.) 365.

conclusion. But, upon reflection, I am satisfied that such a course would, on the whole, be inexpedient, and would not further the ends of justice. All these points may be re-argued before the *Privy Council*, and if there has been any miscarriage of justice in the former decisions of that tribunal, it is fully competent to it to rectify its errors without the intervention of another judgment on the same subjects from this court" (*a*).

The minister should in like manner be presented if he preach, declare, or speak anything in derogation or depraving of the Prayer Book, or anything therein contained, or of any part thereof (*b*), or if he advisedly maintain or affirm, either in the pulpit or by his pen (*c*), doctrines *directly* contrary to the articles of religion (*d*), or to the Book of Common Prayer, or the canons of the Church; as for example, if he impugn the doctrine of the Trinity (*e*); or of original sin and the fall of man, as

(*a*) An appeal was made by Mr. *Mackonochie* to the *Queen* in *Council* against this judgment, but it was afterwards abandoned. It was made in the expectation that it would be heard by the High Court of *Appeal* under "The Supreme Court of Judicature Act, 1873." It was abandoned because of the postponement of the operation of that Act, see *ante*, p. 243, n. (*d*), it not being deemed desirable to submit the re-consideration of these questions to the *Judicial Committee*, who had refused to re-hear the case of *Hebbert* v. *Purchas*, or to allow any doubt to be thrown on the finality of the decisions of the *Judicial Committee*. See 7 Moore, P. C. (N. S.) 551. But there can be no doubt that these questions will forthwith be submitted to the re-consideration of the proper judicial tribunals.

(*b*) 2 & 3 Ed. 6, c. 1, s. 2; 1 Eliz. c. 2, s. 2; 13 & 14 Car. 2, c. 4, s. 24.

(*c*) *Heath* v. *Burder*, 15 Moore, P. C. 1.

(*d*) 1 Eliz. c. 2, s. 2. The word *advisedly* in this statute is not limited in its operation to those who *avowedly* reject the articles, but is used simply to show that the act complained of is the deliberate act of the accused, and not a casual expression dropped inadvertently. *Heath* v. *Burder*, supra.

(*e*) *Bishop* v. *Stone*, 1 Hagg. C. E. 125; *Voysey* v. *Noble*, 7 Moore, P. C. (N. S.) 167; 3 P. C. (L. R.) 357.

specified in the ninth of the articles of religion (*f*); or of the incarnation and divinity of our Lord and Saviour (*g*), or of the atonement by his death and sacrifice (*g*); or of justification by faith, as asserted in the second and eleventh of the articles of religion, and the homily mentioned in the eleventh of such articles (*h*); or deny the return of our Saviour to judge the world (*h*); or if he assert "that in God's word written, Holy Scriptures, and Holy writ, there are found manifest, palpable, and irreconcilable contradictions, and many places which cannot be explained, but so that they be repugnant to others;"—"that the authority of the Gospel according to St. John is doubtful, and that the said Gospel ought not to be applied to establish any doctrine, and that whole chapters of the said Gospel are crowded with passages which represent Jesus Christ as speaking words which he never could have spoken, and which if spoken would not have been believed;"—or that "the Gospel according to St. John contains passages which can only be expounded so that they be repugnant to each other, or to other places of God's written word or Holy Scripture, and that the character of our Lord Jesus Christ, as there set forth, is quite irreconcilable with the idea of his being a teacher sent from God, and is entirely different from the character of the Christ of the other Gospels" (*h*); or if he preach or write disparagingly of episcopal authority, the sacred rite of confirmation, or the necessity and efficacy of the sacraments as means of grace (*i*).

But he will not be liable to ecclesiastical censures for maintaining that the Bible is an expression of devout reason, and, therefore, to be read with reason, in freedom,

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(*f*) *Voysey* v. *Noble*, supra.
(*g*) *Bishop* v. *Stone*; *Voysey* v. *Noble*, supra.
(*h*) *Voysey* v. *Noble*, supra.
(*i*) *Head* v. *Saunders*, 3 Curt. 565; 2 N. E. C. 355; 4 Moore, 186.

taken along with an assertion in the context that the Holy Spirit dwelt in the sacred writers of the Bible ; for this does not warrant the accusation that the Bible is the work of pious men and nothing more, and the proposition or assertion that every part of the Scriptures was written under the inspiration of the Holy Spirit is not to be found either in the articles or in any of the formularies of the Church (*a*).

Nor is there in the formularies of the Church of England any such distinct declaration upon the eternity of final punishment as to require the Court to condemn as penal the expression of a hope by a clergyman, that even the ultimate pardon of the wicked who are condemned on the day of judgment may be consistent with the will of Almighty God (*b*).

Following the example set by the judgment in these cases of the Essays and Reviews (*c*), the *Judicial Committee* of the *Privy Council* in Mr. *Voysey's case* declined in a *quasi*-criminal proceeding to adjudge that that gentleman had been guilty of an ecclesiastical offence by maintaining that the revelation of the knowledge of God by means of any book is impossible ; that all true knowledge of God

(*a*) *Williams* v. *Bishop of Salisbury*, 2 Moore, P. C. 375 ; 9 L. T. (N.S.) 787.

(*b*) *Wilson* v. *Fendal*, 2 Moore, P. C. 375 ; 9 L. T. (N.S.) 788. But, *semble*, it would be otherwise if he absolutely *denied* the eternity of punishment. In *Jenkins* v. *Cook* (*Arches Court*, July 16th, 1875), a full report whereof will be found in "The Times" and "John Bull" for July 17th, the Dean of *Arches* held that a minister was justified in repelling a parishioner from the Lord's table ; *first*, because, having *primâ facie* ground for hesitating to administer to him the Holy Communion, he had submitted that ground to his ordinary, and acted under his "order and direction ;" and secondly, because the parishioner had persistently denied the eternity of punishment and the existence and personality of the devil. See the Rubric to the Communion Office and Canons, 26, 27. Notice of appeal was given.

(*c*) *Williams* v. *The Bishop of Salisbury*, and *Wilson* v. *Fendal*, supra.

comes directly from the law of God written in men's hearts; that all knowledge of God comes only from men's own sense of what he requires them to do; and that the only true revelation possible by God to man is through the sense of God's presence, and is originated in the heart of man independently of God's written word;—on the ground that it is possible to interpret these words as meaning that the Bible itself would be of no effect in imparting a knowledge of God, if that deep sense of what he requires us to do were absent.

In like manner the minister should be presented, if he claim to hold (without preaching or teaching), *all* or *any* of the Romish doctrines which are at variance with the articles of the Church of England (*d*);—if he maintain that there is a visible presence of our Lord upon the altar at the celebration of the holy communion (*e*); or that the Eucharistic service is a true propitiatory sacrifice (*e*); or that adoration is due to the consecrated elements (*e*). But in maintaining the objective, actual and real presence—or the spiritual real presence—a presence external to the act of the communicant, he will, according to the *Dean of Arches*, be maintaining a doctrine which the formularies of our Church, duly considered and construed so as to be harmonious, intended to maintain (*e*); whilst, according to the *Judicial Committee*, he will not be maintaining anything which is contradictory or repugnant to the articles or formularies of the Church, although the Church does not by Her articles and formularies affirm, or require Her ministers to accept any other presence than a presence to the soul of the faithful receiver (*f*). And in speak-

(*d*) *Hodgson* v. *Oakley*, 1 Rob. 322; 4 N. E. C. 180.
(*e*) *Sheppard* v. *Bennett*, 3 Ad. & Ecc. (L. R.) 167; 39 L. J. Ecc. 168.
(*f*) *Sheppard* v. *Bennett* (second appeal), 9 Moore, P. C. (N.S.) 149; 4 P. C. (L. R.) 371.

ing of the Eucharistic service in terms consistent with the doctrine of a commemorative sacrifice, or a sacrament of commemoration, and in maintaining that adoration is due to Christ present in the Sacrament under the form of bread and wine, and that under their veil is the sacred body and blood of Our Lord and Saviour, he will not have exceeded the liberty which the law allows upon these subjects (*a*).

It should, however, be mentioned that in the case of *Ditcher* v. *Denison*, which was a proceeding under the Church Discipline Act before the late Archbishop of *Canterbury*, sitting for the Bishop of *Bath* and *Wells*, who was patron of the venerable defendant's preferments, and therefore disqualified from sitting in person, the most reverend prelate decided that the defendant had committed an ecclesiastical offence by maintaining that "the body and blood of Christ, being really present after an immaterial and spiritual manner in the consecrated bread and wine, are therein and thereby given to all, and are received by all who come to the Lord's table, and that to all who come to the Lord's table, to those who eat and drink worthily, and to those who eat and drink unworthily, the body and blood of Christ are given, and that by all who come to the Lord's table, by those who eat and drink worthily, and by those who eat and drink unworthily, the body and blood of Christ are received," and that "worship is due to the real, though invisible and supernatural, presence of the body and blood of Christ in the Holy Eucharist under the form of bread and wine," although he maintained at the same time that "it is not true that the consecrated bread and wine are changed in their natural substances, for they

(*a*) *Sheppard* v. *Bennett*, Arches and P. C., *supra*. That the doctrine of the real presence is not a doctrine in contravention of the 29th Article of Religion, see also *Sheppard* v. *Bennett* (first appeal), 9 Moore, P. C. (N. S.) 120; 4 P. C. (L. R.) 350.

remain in their very natural substances, and therefore may not be adored." But on appeal to the Court of *Arches* these proceedings were avoided by Sir *John Dodson*, who, without entering into the merits, decided against the suit on the grouud that it was not commenced in due time. An appeal was, thereupon, made to the *Queen* in *Council*, who affirmed the decision of the Dean of *Arches* (*b*). And in *Sheppard* v. *Bennett* (*c*), Sir *Robert Phillimore* declined absolutely to admit that this decision of the Archbishop had any legal validity, or was in any way binding upon him, for various reasons ;—among them, because the decision was appealed from upon the merits, as well as the law, and that the inference that because the appellant was successful *in limine* upon the first objection which he took he would not have been successful on his other objections, would indeed be a novel doctrine of jurisprudence—and because the proceedings against the Archdeacon of *Taunton* were grounded on his alleged contravention of the law with respect to the reception of the Holy Eucharist by the wicked, a question which he had not to decide in the proceeding against Mr. *Bennett* (*d*).

He should also be presented if he indulge in a uniform habit of preaching in such language as to make his congregation feel that he does not consider himself as in charge of those persons who have not, under his view of predestination, the benefit of being God's elect (*e*) ; — "If," said Sir *Herbert Jenner Fust* in his admirable judgment in *Gorham* v. *The Bishop of Exeter* (*f*), "the doctrines of predestination and election and reprobation are to be received as the faith of the Church,

(*b*) See *Ditcher* v. *Denison*, 11 Moore, P. C. 325.
(*c*) 3 Ad. & Ecc. (L. R.) 167 ; 3 L. J. Ecc. 68.
(*d*) See 3 Ad. & Ecc. (L. R.) p. 246.
(*e*) *Burder* v. *Hale*, 6 N. E. C. 611.
(*f*) See 7 N. E. 244 ; and see 2 Roberts, 99.

where is the necessity of prayer at all? Nothing could be done to reverse the decree of God. What encouragement is there for a person to desire to seek and do the will of God, if he is assured that, long before his birth, his fate was determined, by the irrevocable decree of God, for eternal happiness or misery? If these were the doctrines of our Church, that must be the effect of them; and what then becomes of the declaration in our prayers that God has promised forgiveness of sins to *all* who truly repent?—Is that limited to the number of the elect, who alone are to have faith and repentance? Is not this calculated to mislead? Upon this hypothesis, when it is said, 'Almighty God, our heavenly Father, who of his great mercy hath promised forgiveness of sins to all them that with hearty repentance and true faith turn to him,' it must be understood that this is limited to those 'whose hearts he has softened,' — *Electorum corda, quantumvis dura, gratiosè emollit, et ad credendum inflectit; non electos autem justo judicio suæ malitiæ et duritiæ relinquit* (*a*). It appears to me that this would be a subversion of the whole structure of our Common Prayer. The doctrine is, that the elect alone can have faith and repentance, and consequently can alone hope for the forgiveness of their sins; whereas the Scripture cited in the Prayer Book says, 'When the wicked man turneth away from his wickedness that he hath committed, and doeth that which is lawful and right, he shall save his soul alive;' it does not limit this to the elect; in other words, say that the wicked man cannot turn away from his sins, and repent of his wickedness, and receive forgiveness, if he be not among the

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(*a*) From the 6th article of the Synod of Dort, cited by the learned judge in a previous part of his judgment (see 7 N. E. C. 243), for the purpose of contrasting our 17th article with the dogmatic Calvanism of that Synod; and see 2 Roberts, 97.

number of the elect. In the absolution at the commencement of the Common Prayer, it is said, 'He pardoneth and absolveth *all* them that truly repent, and unfeignedly believe his Holy Gospel,' and, therefore, we are taught to 'beseech Him to grant us true repentance and his Holy Spirit.' And this declaration runs through all the services, the collects and the communion service; it is addressed to all who may repent, not confined to those who are of the elect, whose fate was fixed and determined before they came into existence."

In like manner he should be presented if he denounce from the pulpit the practice of bowing at the name of Jesus, a practice beautifully described in, and sanctioned by the 18th canon, to which he at least, as a clergyman, is bound to defer (*b*); or if in the progress of his sermon he make a personal attack upon the views of a brother clergyman (*c*), or indulge in irreverent, violent, and censorious remarks on individual members of his congregation (*d*).

It would seem also from the case of *Poole* v. *The Bishop of London* (*e*), that he should be presented, if he adopt a course with reference to confession, which is likely to cause scandal and injury to the Church, especially of questioning females on the subject of violations of the seventh commandment, or of systematic admission of his people to confession and absolution (*f*).

(*b*) *Burder* v. *Hale*, 6 N. E. C. 611.

(*c*) *Ibid.*; and see Can. 53.

(*d*) *Burder* v. *Hale*, 6 N. E. C. 611; and see *Burder* v. *Langley*, 1 N. E. C. 542.

(*e*) 5 Jur. (N. S.) 522.

(*f*) It must, however, be borne in mind, that Mr. *Poole's case* was that of a *licensed curate*, not of an *incumbent*, and that the Bishop of *London* revoked Mr. *Poole's* license under the wide discretion conferred, or supposed to have been conferred, upon him by the 98th section of 1 & 2 Vict. c. 102, "for a cause which appeared to him to be good and reasonable," without any decision

Before we pass from this part of our subject it will be necessary to say a few words upon the important case of *Gorham* against *The Bishop of Exeter*. That case arose out of the refusal by the late Bishop of Exeter to institute the Rev. George Cornelius Gorham to the vicarage of Bramford Speke, in the diocese of Exeter, to which he had been presented by the Crown. Mr. Gorham in consequence obtained a monition from the Court of *Arches*, calling upon the Bishop to institute him to the living, or to show cause why he should not be instituted by the official principal of the *Arches Court*. The Bishop appeared to the monition, and justified his refusal to institute Mr. Gorham to the vicarage upon the ground that he was of unsound doctrine respecting the great and fundamental point of baptism, inasmuch as he held, and persisted in holding, that spiritual regeneration is not given or conferred in that Holy Sacrament—in particular, that infants are not made therein members of Christ and the children of God, contrary to the plain teaching of the Church of England in her articles and liturgy, and especially contrary to the divers offices of baptism, the office of confirmation, and the catechism, severally contained in the Book of Common Prayer, and administration of the sacraments and other rites and ceremonies of the church, according to the use of the United Church of

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as to whether Mr. *Poole* had in strictness transgressed the laws of the Church of England. The Archbishop of *Canterbury*, however, in confirming the revocation of the license, stated that he was of opinion that the course pursued by the appellant was not in accordance with the rubric or doctrine of the Church of England. At the same time, it cannot be seriously denied that the Church of England not only sanctions, but in many cases encourages and recommends confession. See especially the exhortation to the holy communion in "the Order of the Administration of the Lord's Supper," and the rubric to the "Order of the Visitation of the Sick." Mr. *Poole* appealed to the *Queen* in *Council*, but it was ultimately held that no appeal lay. See *Poole* v. *The Bishop of London*, 14 Moore, P. C. 262.

England and Ireland. And for proof of the premises he referred to and brought into Court a book written and published by Mr. Gorham containing the several questions put by him to Mr. Gorham in the course of a recent examination to which the Bishop had felt it to be his duty to subject that gentleman, and Mr. Gorham's several answers to the same questions. Mr. Gorham, in reply, admitted that this book contained a full, true, and accurate account of all the questions and answers which were given in the course of the examination; but denied that he in his examination did maintain, or had at any time maintained, unsound doctrines respecting the efficacy of the sacrament of baptism, or that he had held, or persisted in holding, any opinions thereon at variance with the plain teaching of the Church of England in her articles and liturgy. The only evidence adduced on either side was the book above mentioned, and upon this evidence the case came on to be heard before Sir *Herbert Jenner Fust.*

That learned judge, after stating that the question at issue between the parties was as to the efficacy of baptism in the case of infants, and complaining that Mr. Gorham had so mixed up in his answers the case of infants with that of adults that it was almost impossible to separate the two, and that the Court was compelled to find its way amongst the mass of questions and answers in the book in order to discover what the doctrines of Mr. Gorham were, proceeded to a careful examination of those questions and answers, and thereby arrived at the conclusion that Mr. Gorham denied the doctrine of baptismal regeneration, and insisted that spiritual regeneration is not given by or through baptism, but by an act of prevenient grace. He then, in a masterly and unanswerable review of the articles and formularies of our Church showed that according to those articles and formularies spiritual regeneration is given at baptism;

and he decided that Mr. Gorham had maintained doctrine opposed to the doctrine of the Church of England, and that the Bishop had shown sufficient cause why he did not institute him to the vicarage of Bramford Speke (*a*).

Mr. Gorham thereupon appealed to the *Judicial Committee* of the *Privy Council.* The *Judicial Committee,* in their judgment, complained, even more than Sir *Herbert Jenner Fust,* of the difficulties surrounding the case. They complained that it was brought before them and left in such a form, that without being supplied with any allegation distinctly stated, or any issue distinctly joined, they were called upon minutely and accurately to examine a long series of questions and answers—of questions upon a subject of a very abstruse nature, intricate, perplexing, entangling, and many of them not admitting of distinct and explicit answers —of answers *not given plainly and directly, but in a guarded and cautious manner, with the apparent view of escaping from some apprehended consequence of plain and direct answers.*

They then went on to state, that in considering the examination, which was the only evidence, they must have regard not only to the particular question to which each answer was subjoined, but to the general scope, object, and character of the whole examination ; and if, under circumstances so peculiar and perplexing, some of the answers should be found difficult to be reconciled with one another (as they thought was the case), justice required that an endeavour should be made to reconcile them in such a manner as to obtain the result which appeared most consistent with the general intention of Mr. Gorham in the exposition of his doctrine and opinion.

Adopting this course, the doctrine held by Mr. Gorham

(*a*) See *Gorham* v. *The Bishop of Exeter* (Arches), 2 Roberts 1 ; 7 N. E. C. 187.

appeared to them to be this, "that baptism is a sacrament generally necessary to salvation, but that the grace of regeneration does not so necessarily accompany the act of baptism, that regeneration invariably takes place in baptism; that the grace may be granted before, in, or after baptism; that baptism is an effectual sign of grace by which God works invisibly in us, but only in such as worthily receive it—in them alone it has a wholesome effect; and that, without reference to the qualification of the recipient, it is not in itself an effectual sign of grace; that infants baptised, and dying before actual sin, are certainly saved; but that in no case is regeneration in baptism unconditional;" and in the course of their judgment they further showed that, according to their view, what Mr. Gorham meant by saying that in no case is regeneration in baptism unconditional was this, that the sacrament is effectual only in such as *rightly receive it*, and that by *right reception* is always meant or implied a fit state to receive, viz., in the case of adults, "with faith and repentance," and in the case of infants, "with God's grace and favour."

The *Judicial Committee* having thus stated their view of Mr. Gorham's doctrine, decided that the doctrine held by him was not contrary or repugnant to the *declared* doctrine of the Church of England as by law established, and that Mr. Gorham ought not, by reason of the doctrine held by him, to have been refused admission to the vicarage of Bramford Speke. And they reported to Her Majesty that the sentence pronounced by the learned judge in the *Arches Court* of Canterbury ought to be reversed; and that it ought to be declared that the Lord Bishop of *Exeter* had not shown sufficient cause why he did not institute Mr. Gorham to the said vicarage (*b*).

(*b*) See *Gorham* v. *The Bishop of Exeter* (P. C.), 7 N. E. C. 413; and see Mr. *Moore's* report of this case, p. 458, *et seq.*

The judgment of Sir *Herbert Jenner Fust* has therefore been reversed by the *Judicial Committee* of the *Privy Council;* but although they have reversed his judgment, it by no means follows that they have overruled his law. It is indeed confidently submitted that they have not done so. A fair and impartial comparison of the doctrine held by Mr. Gorham according to Sir *Herbert Jenner Fust* with the doctrine held by him according to the *Judicial Committee*, will show that the two tribunals, in the discharge of a difficult duty imposed upon them of ascertaining Mr. Gorham's doctrine from his guarded, cautious, and evasive answers, differed materially *in point of fact*, or at least must be taken and assumed so to have differed, as to what really were the doctrines held by Mr. Gorham.

According to Sir *Herbert Jenner Fust*, Mr. Gorham denies that regeneration is conveyed by or through baptism, and insists that it is given by an act of prevenient grace. According to the *Judicial Committee*, he does nothing of the kind; at least there is nothing in his doctrine, according to them, necessarily leading to the conclusion that he does so; indeed, it would rather seem, upon a just and equitable construction of their statement of his doctrine, that Mr. Gorham admits that baptism is the ordinary channel of regeneration, insisting, at the same time, that regeneration does not invariably take place in baptism, and that, to render the sacrament effectual, it must be received by the

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The committee consisted of Lord *Campbell*, Lord *Langdale* (M. R.). Mr. Baron *Parke* (afterwards Lord *Wensleydale*), Vice-chancellor *Knight Bruce*, Dr. *Lushington*, and Mr. *Pemberton Leigh* (Lord *Kingsdown*). The Archbishops of *Canterbury* and *York* and the Bishop of *London* sat as assessors. The Vice-chancellor *Knight Bruce* dissented from the judgment; and the Bishop of *London* did not concur with the most reverend prelates, the Archbishops of *Canterbury* and *York*, in their approval of it.

adult with faith and repentance, and by the infant with God's grace and favour. It is nowhere said in the statement that regeneration is not conveyed through baptism; there is no mention therein of "prevenient grace;" nor is there, as it is submitted, anything contained in it necessarily involving the denial that God's grace and favour are always conferred upon *children* at their baptism—on the contrary, the assertion that baptism is generally necessary to salvation, and that infants baptised and dying before actual sin are certainly saved (unexplained by the hypothesis *that they must therefore have been regenerated by an act of prevenient grace*), would seem to involve the admission of this fundamental truth.

Now, whether the view above expressed of the effect of this statement of doctrine be strictly correct or not, and whatever may be the opinion entertained as to the possibility of reconciling such statement with sound doctrine, this at any rate is manifest—that there is a marked difference between such doctrine and the palpably unsound doctrine condemned by Sir *Herbert Jenner Fust.* And this being so, it follows that the judgment of the *Judicial Committee*, which can only be considered a binding authority on the point judicially determined by them, is no authority whatever for the position that a minister of the Church of England may lawfully deny the doctrine of baptismal regeneration, and insist that spiritual regeneration is not given by or through baptism, but by an act of prevenient grace (*a*).

(*a*) It is submitted that the legal effect of the judgment of the *Judicial Committee* has been fairly stated in the text. As to any opinion they may appear to have expressed in favour of the lawfulness of maintaining the doctrine condemned by the Court of *Arches*, it cannot weigh one feather in the scale against the plain and manifest teaching of our Church (see the Prayer Book,

Should the churchwardens, therefore, be so unfortunate as to hold office in a parish where the minister manifestly maintains this unsound doctrine, it will be their duty, notwithstanding the reversal of Sir *Herbert Jenner Fust's* judgment, to present him to the ordinary for so doing. When they have done this they will have done their duty; the responsibility of determining whether any and what ulterior proceedings shall be taken will rest with the ordinary, not with the churchwardens.

Articles, Canons, and Homilies, *passim*), and the unanswered and unanswerable argument of Sir *Herbert Jenner Fust*. For example, what weight can any honest man of ordinary intelligence and education attribute to the suggestion which would seem to have been thrown out by them (see 7 N. E. C. 430), that a pretence is furnished for the denial of the doctrine of the spiritual regeneration of infants in baptism from the fact that the following rubric at the end of the office for the ministration of public baptism of infants, to wit, "It is certain by God's word, that children which are baptised, dying before they commit actual sin, are undoubtedly saved," does not go on to say, in express words that they are saved by baptism? Why, if a shadow of a shade of a doubt could really be entertained upon the face of this rubric, as to its being a dogmatic declaration of the spiritual benefits resulting to children *from* baptism by reason of their being thereby and therein regenerated and transferred from a state of condemnation into a state of grace and favour with God, it must at any rate be entirely removed by the rubric immediately following concerning the use of the sign of the cross in baptism; for this rubric refers to and incorporates into itself the 30th canon, by which canon it is expressly declared that "*the benefits of Christ*" (and surely the *Judicial Committee* would scarcely suggest that a clergyman may lawfully hold that there are any other means whereby men must be saved) "*are bestowed upon children in baptism*,"—to say nothing of the fact that our Church, full of hope and charity as she is, forbids the order for the burial of the dead to be used for children that die unbaptised, classing them in this respect with persons excommunicate (see the first rubric prefixed to the order for the burial of the dead), who are to be "taken of the whole multitude of the faithful as heathens and publicans" (Article 33),—which assuredly She would not do, if She had authority *by God's word* to declare of them, as of baptised children dying in their infancy, that they are undoubtedly saved, or even to pronounce over them the charitable

The minister should also be presented if he officiate, either by preaching or otherwise, at the religious services of Nonconformists, whether in their licensed chapels or elsewhere (*a*)

It should be added that if a clergyman of the Church of England publicly read prayers and perform divine offices according to the rites of the Church of England in an un-

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hope of her burial service, that they "rest in the Lord Jesus." Look again at the third homily of the First Book of Homilies, "The homily of the salvation of mankind, by only Christ our Saviour, from sin and death everlasting." Why, in this homily it is, in like manner, declared expressly and unequivocally, that *remission of original sin is given in baptism*, and that *children, being baptised and dying in their infancy, are saved:* and this homily, be it remembered, is actually part and parcel of the Articles of Religion; for it is the identical homily referred to by and incorporated with the 11th Article as the Homily of Justification. Of this there can be no reasonable doubt; it is not indeed called the homily of justification—there is no homily called by that name—but it is essentially the *homily of justification*, the whole aim and scope of it being, as declared by the article, largely to express what a most wholesome doctrine, and how very full of comfort, is the doctrine (rightly understood) of justification by faith only, and not by our own works and deservings: it is the only homily devoted to this subject, and there is no other to be found in either of the books of homilies to which the Article could by possibility refer. *For the satisfaction of those churchwardens who may desire to test the correctness of these observations, and may not have the canons and homilies at hand, the whole of the 30th canon, and the necessary extracts from the homily "of the Salvation of Mankind," are given in the Appendix.* See also the judgment of the *Judicial Committee* in *Voysey* v. *Noble, vide* supra, pp. 410, 411.

(*a*) There can be no reasonable doubt that by so doing he will have committed an ecclesiastical offence and rendered himself liable to ecclesiastical censures. The author is confirmed in this view by the learned and elaborate opinions of Mr. *Fitzjames Stephen*, Q. C., and Mr. *Benjamin Shaw*, which have been respectively obtained, owing to the attempt which was made by the Rev. *W. H. Freemantle* to officiate in a dissenting chapel, called "The City Temple," but which was happily prevented by the prompt interference of the Bishop of *London*. Mr. *Stephen's* opinion will be found in "The Times" for June 14th, 1875; Mr. *Shaw's* in "The John Bull" for the 19th of that month.

consecrated chapel, without license or authority from the Bishop, he will have committed an ecclesiastical offence for which he ought to be presented (*a*), although he may have qualified himself as a dissenting teacher, and duly registered the chapel as a dissenting chapel (*b*).

The minister should also be presented if he absent himself from his benefice, or from the house of residence belonging thereto, for any period exceeding the space of three months together, or to be accounted at several times in any one year, unless he have duly obtained a license from his bishop authorising him to reside out of the proper house of residence of his benefice, or out of the limits of his benefice, as the case may be, or unless he shall be resident at some other benefice of which he may be possessed (*c*), or if he farm on his own account above eighty acres of land without the consent of the bishop (*d*), or engage in trade, to buy or sell again for profit or gain, unless the trade shall

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(*a*) Can. 71; *Carr* v. *Marsh*, 2 Phill. 198; *Freeland* v. *Neale*, 1 Rob. 643; 6 N. E. C. 252; *Kitson* v. *Drury*, 11 Jur. (N.S.) 272; so, also, if against consent of the incumbent, *Carr* v. *Marsh*, *Freeland* v. *Neale*; although he may have had the consent of the previous incumbent, *Richards* v. *Fincher*, 4 Ad. & Ecc. (L. R.) 255.

(*b*) *Barnes* v. *Shore*, 1 Rob. 382; 4 N. E. C. 593; *Shore* v. *Barnes*, 4 N. E. C. 607; *Barnes* v. *Shore*, 8 Q. B. 640. As to the recent exemptions from temporal penalties in certain cases, see the Act for securing the liberty of religious worship, 18 & 19 Vict. c. 86; and see the statute 33 & 34 Vict. c. 91, "The Clerical Disabilities Act, 1870," as to the relief of persons admitted to the office of priest or deacon in the Church of England, who avail themselves of its provisions, in respect of civil disabilities and in certain other respects. That a clerk who has executed a deed under this Act, and had it enrolled with a view of relinquishing his office, but who has not taken any further steps required by the Act, may have the enrolment vacated, see Ex parte *a clergyman*, 15 Eq. (L. R.) 154.

(*c*) See 1 & 2 Vict. c. 106, ss. 32, 33, 43; *Bluck* v. *Rackham*, 1 Rob. 367; 5 Moore, P. C. 305.

(*d*) 1 & 2 Vict. c. 106.

be carried on by more partners than six, or shall have devolved upon him, or upon any person for his benefit, by virtue of any demise, bequest, inheritance, intestacy, marriage settlement, bankruptcy, or insolvency, or even in such case, if he act as a director or managing partner, or carry on such trade or dealing in person (*e*); and, generally, if he transgress in any manner against the provisions of the Act for abridging the holding of benefices in plurality (*f*), or against any other of the statutes, laws, or canons ecclesiastical.

It can scarcely be necessary to remark that if the minister be guilty of any gross impiety or immorality, he is to be presented equally with the other parishioners (*g*).

It may be mentioned here that it is provided by the 13th section of "The Incumbents' Resignation Act, 1871" (34 & 35 Vict. c. 44), that every pensioned clerk shall remain amenable to ecclesiastical discipline and be liable to suspension from or forfeiture of pension for offences which would have involved suspension from or forfeiture of the benefice, had he remained incumbent thereof, and that

(*e*) 1 & 2 Vict. c. 106, ss. 29, 30.

(*f*) See 1 & 2 Vict. c. 106; *Burder* v. *Mavor*, 1 Rob. 614; 6 N. E. C. 1; *Re Bartlett*, 18 L. J. Exch. 25.

(*g*) *Rich, D. D.* v. *Garvard and Loder*, 1 Hagg. E. R. Append. 7; *Burgoyne* v. *Free, D.D.*, 2 Hagg. 456; *Griffith* v. *Reed*, 1 Hagg. C. R. 208; *Burder* v. *Speer*, 1 N. E. C.; *Speer* v. *Burder*, 2 Moore, 166; *Burder* v. ——, 3 Curt. 822; *Trower* v. *Hurst*, 1 Robert, 597; 4 N. E. C. 52; *Bishop of Lincoln* v. *Day*, 1 Robert, 724; 4 N. E. C. 299; *Clarke* v. *Heathcote*, 1 Robert, 577; 4 N. E. C. 321; *Kitson* v. *Loftus*, ibid. 323; *Brookes* v. *Cresswell*, 1 Robert, 606; 4 N. E. C. 429; *Burder* v. *Hodgson*, ibid. 483; *Farnell* v. *Craig*, 5 N. E. C. 557; *Burder* v. *Hale*, 6 N. E. C. 611; *Maddox* v. *Carr*, 14 Jur. 275; *Bonwell* v. *The Bishop of London*, 14 Moore P. C. 395; *The Bishop of Norwich* v. *Berney*, 36 L. J. Ecc. 8; *The Bishop of Norwich* v. *Pearce*, 2 Ad. & Ecc. (L. R.) 261. That a suspension *ab officio et a beneficio* deprives the clerk and his creditors under a sequestration of all right to the proceeds of the living pending the suspension, see *Burder* v. *Cresswell*, 14 Q. B. 825, 19 L. J. Q. B. 357; *Morris* v. *Ogden*, 4 C. P. (L.R.) 687; In re *Thakenham Sequestration Moneys*, 12 Eq. (L.R.) 494, see p. 423.

proceedings under the 3 & 4 Vict. c. 86, may be taken against him in the same manner in all respects as if the offence had been committed within the said benefice,—and that the section contains provisions for proceeeding against him, when he resides elsewhere than in England or Wales or the Channel Islands.

It may not be amiss to observe that, by a recent Act of parliament (*a*), the several Acts and parts of Acts of parliament mentioned in the schedule, and every other enactment then in force, which might be read or construed as requiring the observance of the 30th day of January, the 29th day of May, the 5th day of November, and (in Ireland) the 29th day of October respectively, as anniversary days, or the use of any special services in the church for those days respectively, are repealed.

It may be added in general terms, that the churchwardens are to present all transgressions of the ecclesiastical laws within their parish, which may come to their knowledge, and are also, in common with the other parish authorities, to use all due temporal means for the suppression of impiety, immorality and disorder (*b*).

And finally, it should be mentioned here that the fees payable by churchwardens at visitations in those cases where by custom (*c*) any fees at all are payable, are now regulated by the table of fees settled by the Archbishop of *Canterbury*, the *Lord Chancellor*, and the Archbishop of *York*, and published in the "London Gazette" of the 19th of March, 1869, under the provisions of 30 & 31 Vict. c. 135, which statute and table also regulate the fees

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(*a*) 22 Vict. c. 2.

(*b*) See further as to presentments, c. 4, ss. 2, 3, and the articles of inquiry given in the Appendix.

(*c*) That no fee is payable on visitations, admissions, or presentments, except by custom, see *Goslin* v. *Ellison*, 1 Salk. 330; and see *ante*, p. 267. As to the personal liability of churchwardens for these fees, see *Veley* v. *Pertwee*, supra, p. 87, note (*g*).

to be paid on the consecration of churches, chapels, cemeteries, and burial grounds, on and incidental to the grant of faculties (*d*), and on the ordination of deacons and priests. The statute contains the following provision :—"Provided always, that nothing in this Act shall extend to render lawful the demand of any fee whatever from any person by whom or for the performance of any duty for which no fee is now by law payable, nor to enable the persons hereinbefore in that behalf authorized to ordain or establish any fee exceeding the fee which for twenty years next preceding the passing of this Act shall have been usually taken for or in respect of the same matter within the diocese of London" (*e*).

Before concluding this section the attention of the churchwardens should be directed to the recent statute, called "The Public Worship Regulation Act, 1874" (37 & 38 Vict. c. 85), and which, by its heading, purports to be "An Act for the better administration of the Laws respecting the Regulation of Public Worship."

As the Act, though a very important one, is by no means a long one, and is, together with the rules and orders of the Court, which have just been made by Order in Council (*f*), set out *in extenso* in the *Appendix* (*g*), it will be deemed sufficient in this place to refer briefly to some of its more prominent features.

(*d*) As to the fees payable for faculties directed to be applied for by the judge under "The Public Worship Regulation Act, 1874" (37 & 38 Vict. c. 85), and the fees payable in respect of any alteration in or addition to the fabric of any church, or in respect of any ornaments or furniture, not being contrary to law, made or existing in any church at the time of the making of that Act, see sect. 14 of the Act, App., p. xlvi.

(*e*) See sect. 1; and see the table, so far as it relates to consecrations, faculties, and visitations, in the Appendix, p. lxxii.

(*f*) Appendix, p. lxxiv.

(*g*) *Id.*, p. xl.

The most important sections are the 7th, the 8th, and the 9th.

The 7th section provides for the appointment, within a given time, and with the approval of Her Majesty, to be signified under her sign manual, of the new judge therein described as "a judge of the Provincial Courts of *Canterbury* and *York*," by the two Archbishops *jointly*, and that in default of such appointment Her Majesty may appoint the judge by letters patent—and it provides that upon a vacancy occurring in the office of official principal of the *Arches Court* of Canterbury the Judge shall become *ex officio* such official principal, and that all proceedings thereafter to be taken before him in relation to matters arising within the province of Canterbury shall be deemed to be taken in the *Arches Court* of Canterbury, and that on a vacancy occurring in the office of official principal or auditor of the *Chancery Court* of York he shall become *ex officio* such official principal or auditor, and that all proceedings thereafter taken before him in relation to matters arising within the province of York shall be deemed to be taken in the *Chancery Court* of York.

By the 8th section it is provided that if the archdeacon of the archdeaconry, or a churchwarden of the parish, or any three parishioners of the parish within which archdeaconry or parish any church or burial ground is situate, or for the use of any part of which any burial ground is legally provided, shall be of opinion,—

(1.) That in such church any alteration in or addition to the fabric, ornaments, or furniture thereof has been made without lawful authority, or that any decoration forbidden by law has been introduced into such church; or,

(2.) That the incumbent has within the preceding twelve months used or permitted to be used in such church or burial ground any unlawful ornament of the minister of the

church, or neglected to use any prescribed ornament or vesture ; or,

(3.) That the incumbent has within the preceding twelve months failed to observe, or to cause to be observed the directions contained in the Book of Common Prayer relating to the performance in such church or burial ground of the services, rites, and ceremonies ordered by the said book, or has made or permitted to be made any unlawful addition to, alteration of, or omission from such services, rites or ceremonies, such archdeacon, churchwarden or parishioners may, if he or they think fit, send to the bishop a written complaint and declaration of its truth as provided by the Act. But the section contains a proviso that no proceedings shall be taken under the Act as regards any alteration or addition to the fabric, if such alteration or addition has been completed five years before the commencement of such proceedings.

By section 9 it is provided that unless the bishop shall be of opinion that proceedings should not be taken, he shall, in manner prescribed by the Act, ascertain whether the parties are willing to submit to the directions of the bishop without appeal,—that if they are, he shall hear and adjudicate on the matter,—but that if they are not, he is to transmit the representation to the archbishop of the province, who is forthwith to require the judge to hear the matter at any place within the diocese or province, or in London or Westminster,—that the judge shall require the party making the representation to give security for costs,—and that he shall hear and pronounce judgment on the matter of the representation, and issue such monition, if any, and make such order as to costs as the judgment shall require.

By the interpretation clause it is enacted that the term "parishioner" shall mean a male person of full age, who, before making any representation under the Act, has trans-

mitted to the bishop under his hand a solemn declaration that he is a member of the Church of England as by law established, and who has had his usual place of abode in the parish for one year next before taking any proceedings under the Act.

By section 12 an appeal to Her Majesty in *Council* is given.

And by the 5th section it is enacted that "nothing in this Act contained, save as herein expressly provided, shall be construed to affect or repeal any jurisdiction which may now be in force for the due administration of ecclesiastical law."

The following observations suggest themselves with reference to this Act :—

1. That the Act is by no means limited in its operation to the simplification of procedure in matters relating to the regulation of public worship; but that it effects grave and serious alterations in the constitution of the Courts by which these and other matters of ecclesiastical cognisance are to be dealt with.

That whilst the Act empowers the Bishop to determine that proceedings shall not be taken, and requires him to hear and adjudicate upon those cases in which the parties agree to submit to his directions without appeal, in all cases under the Act it supersedes the authority and jurisdiction of his *Courts* and of the *Provincial Court* of the Archbishop; and, except in the instances above referred to where the jurisdiction is given to the Bishop, confers the entire judicial authority and jurisdiction upon the new tribunal created by Act; and, moreover, upon vacancies occurring in the offices of "Judge of the Provincial Court of *Canterbury*," and "Judge of the Provincial Court of *York*" respectively, virtually abolishes in all cases these ancient independent *Ecclesiastical Courts of Appeal*, hitherto presided over by official principals appointed by the respective Archbishops—although it

retains them in name and in form, and provides that all proceedings shall be *deemed* to be taken in them—and transfers the entire authority and jurisdiction of the judges of these Courts to the new "Judge of the Provincial Courts of *Canterbury* and *York*," created and appointed by and under the provisions of the Act.

2. That although the churchwarden is, in common with the archdeacon and the three parishioners, authorized to take proceedings under the Act, he is not required, nor is it any part of his duty as churchwarden to do so,—he may do so, *if he think fit;* but it is still open to him, in the discharge of his office of "observation and complaint" (*a*), and in fulfilment of his solemn obligation made on admission to his office (*b*), to proceed by presentment to the ordinary according to the laws ecclesiastical of this realm.

3. That by making a representation to the bishop under the Act he will, if the party against whom the representation is made determine to contest the matter, have adopted a step which will, in all probability, involve him in personal litigation, and subject him to the risk of the payment of costs.

4. And this observation is addressed to parishioners generally:—That the fact that, whilst any three parishioners who make the representation must be persons who have previously declared themselves members of the Church of England, the churchwarden is authorized to act without any such condition, furnishes a strong additional reason why the parishioners ought to be careful to appoint churchmen only to the important office of churchwarden.

For the further consideration of the Act the churchwardens are referred to the Act itself, and to rules and orders as set out in the Appendix (*c*).

(*a*) See *per* Sir *R. Phillimore* in *Ritchings* v. *Cordingley*, 3 Ad. & Ecc. (L. R.) 121.

(*b*) *Ante*, p. 36, and see p. 1.

(*c*) Appendix, pp. xl, lxxiv.

SECTION II.

On Sequestrations.

Another branch of the churchwardens' office is to have the sequestration and care of the benefice during its vacancy, whether the avoidance happen by death or otherwise, and therefore, as soon as there shall be any such avoidance, the churchwardens are to apply to the chancellor of the diocese for the sequestration, and having taken out an instrument for it under the seal of the office, are thenceforth to take the whole benefice under their care, and are to manage all the profits and expenses of it for the benefit of him that shall next succeed, which they are to do with the best of their care and skill, and with the same fidelity and good husbandry as if they were their own; that is, according as the season of the year shall require, they are to plough and sow his glebes, take in the crop from off them, gather in his tithes, or collect his rent-charge into which the tithes of the parish may have been commuted (*a*), thresh out and dress his corn, and dispose of it at the best market they are able. And they are also to repair his houses, make up his fences, pay his tenths, synodals, and procurations, and discharge all other burthens of the living which shall be incumbent on it while it is under this trust, and do everything else which shall be best for his advantage; and, principally, they are to take care that during the vacancy the church be well and duly served by such curate as the

(*a*) 6 & 7 Will. 4, c. 71; 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & 3 Vict. c. 62; 3 Vict. c. 15; 5 & 6 Vict. c. 54; 9 & 10 Vict. c. 73; 10 & 11 Vict. c. 104; 14 & 15 Vict. c. 53; 23 & 24 Vict. c. 93; 36 & 37 Vict. c. 42.

bishop shall approve (*b*), whom they are to pay out of the profits of the benefice. And it will be safest for them to get it stated by the ordinary, when they take out the sequestration, what they are to pay him weekly for the service of the said cure, for then there can be no contention about it when they make up their accounts (*c*). And this trust in them is to last till it be superseded by the institution of a new minister, unless in the interim the ordinary shall see just cause to recall the said sequestration and grant it to others. And as the ordinary, on any such just cause, hath power to grant the sequestration to others, so also hath he in the first issuing out of it, and may then, if he see reason for it, put the said trust into the hands of other men that are willing to accept it. But the churchwardens are the proper officers for this business, who are bound by virtue of their office to take it upon them whensoever enjoined, and therefore, should they be backward to take out the sequestration, or unwilling to meddle therewith, the

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(*b*) That a churchwarden cannot prevent a minister appointed under a sequestration from officiating in the church, see *Prout* v. *Cresswell*, 1 Lee, 36; and that a churchwarden, as such, has no authority during a vacancy to provide for divine service, or even to perform it himself in the event of his being in holy orders, see *Attorney-General* v. *The Master and Brethren of the Hospital of St. Cross*, ex parte *Holloway*, 25 L. J. Ch. 202. The course to be pursued is for the churchwarden to act under a sequestration to provide for the services, and in so doing he acts as the officer of the bishop and not as churchwarden.

(*c*) By 1 & 2 Vict. c. 106, s. 99, the bishop is to appoint curates to all sequestered benefices, and by sect. 100 he is to assign them salaries; but the license of the bishop and assignment of salary by him are not absolutely necessary where the curate is temporarily appointed from week to week, to meet the exigencies of the case, during a sequestration through the death of the incumbent: *Dakins, Clerk*, v. *Seaman, Clerk*, 9 M. & W. 777. As to the appointment of curates in certain cases under sequestrations upon judgments against the incumbents, or under their bankruptcies, see "The Sequestration Act, 1871" (34 & 35 Vict. c. 46).

ordinary may by his citation, cite them before him, and command them, under the penalty of contumacy, to take this charge upon them, that so the fruits of the benefice be not lost, dissipated, or embezzled during the vacancy, for want of proper trustees to take care of them (*a*).

As soon as a new minister is instituted the said churchwardens or other sequestrators are to account to him for all the profits of the benefice which they have received during the vacancy. For all these belong to him from the death of the predecessor, how long soever the vacancy may have been; and if he be satisfied with their account he gives them his discharge, and this wholly concludes the matter. But if he be dissatisfied in any particulars, either that he thinks they charge him too high in the expenses, or themselves too low in the receipts, or in any other matter have not discharged themselves as faithful stewards for him, he may then bring them to account before the ordinary, by whom all things relating thereto are to be examined and decided (*b*)

And sometimes livings are sequestered on other occasions than on vacancies. For, on a suspension there must be a sequestration for the serving of the cure, and in case of dilapidations, either in the chancel or the minister's house, a sequestration is often necessary for repairing them, and sometimes a sequestration is commanded by the Queen's writ for the payment of the minister's debts (*c*); in all which cases the churchwardens are necessarily obliged to be the sequestrators, unless the ordinary find others willing to undertake it, whom he judgeth proper to

(*a*) Prid. 160, 161, 162.
(*b*) Prid. 162, 163.
(*c*) In this case the creditor is the person to whom the sequestration is usually granted; *Hubbard* v. *Beckford*, 1 Hagg. C. R. 310.

be entrusted with it, in all which sequestrations there must be the like management, and the like account given as above mentioned. And to oblige the sequestrators the more hereto, the ordinary usually binds him to it by a bond, especially when the profits sequestered are likely to amount to any considerable value, which bond may be sued at common law, if the sequestrators cannot otherwise be brought to give a true and faithful account of the trust (*d*).

In all sequestrations the churchwardens or other sequestrators are to take care that they meddle not with any timber, trees, woods or underwood standing upon the glebes of the living, unless it be for necessary repairs, nor commit any other waste upon the living. For if the minister himself should fell any timber to sell, or for any other purpose, unless for the repair of the house or chancel, or should cut down any wood, unless for the repairing of the gates, stiles or fences of the premises, or for necessary fuel in his house, he doth thereby make waste upon his living, which waste is reckoned a dilapidation of it, and when it is wilfully committed, is a just cause of deprivation. But should the sequestrators, who are trustees to preserve the living, make any such waste upon it, it would be much more criminal in them (*e*).

The sequestrator, however, though invested with such powers as to the management of the living, was, until lately, but the bailiff of the bishop. He had no *interest* in the living, and could not maintain an action in his own name (*f*).

But the law in this respect has recently been altered.

(*d*) Prid. 163, 164.
(*e*) Prid. 164.
(*f*) *Harding* v. *Hall*, 10 M. & W. 42.

He may now sue in his own name, and require indemnity of the creditor at whose suit the sequestration shall have issued (*a*).

SECTION III.

On the Annual Return to be made by the Churchwardens to one of Her Majesty's principal Secretaries of State of the Amount of Church Rates levied in their Parish, on passing the Accounts of the old Churchwardens, and on delivering over the Goods of the Church to their Successors in Office.

By a recent statute for providing for an annual return of rates, taxes, tolls and dues levied for local purposes in England (*b*), the churchwardens are required to make an annual return of the sums levied or received for church rates, and of the expenditure thereof, to one of Her Majesty's principal Secretaries of State, in the month of June in every year.

One of the last duties of the churchwardens during the year of office is to return to the ordinary the names of the persons who have been chosen to succeed them, and to present them to him for admission (*c*).

(*a*) 12 & 13 Vict. c. 67.

(*b*) 23 & 24 Vict. c. 51. See the substance of this statute in the Appendix, p. xxvi.

(*c*) *Ante*, p. 36, and see *Anthony* v. *Segar*, 1 Hagg. C. R. 10; *Story* v. *Colk and Preedy*, 6 N. E. C. sup. 33. The churchwardens were also formerly required at the Easter visitation to deliver in bills invented of all christenings, marriages, and burials in the year foregoing, that the same might, by the officers of the ordinary, be transmitted to the registry of the bishop (Prid. 149; Can. 70); and now copies of the register books of baptisms and burials, verified by the minister and signed by one of the churchwardens, are to be transmitted by the churchwardens, by post, to the registrars of the diocese, on or before the 1st day of June in every year (52 Geo. 3, c. 146); and copies of all entries of

As soon as the new churchwardens have been admitted the power and authority of the old churchwardens is at an end; they are then *functi officio;* their duties devolve exclusively on their successors; and they can do no further acts as churchwardens; they may, however, continue an action previously commenced by them (*d*).

But if they have not commenced the action, the action should be by their successors, although the cause of action arose during the time of the outgoing churchwardens (*e*).

In these cases it is said, that if the cause of action in respect of which the churchwardens sue arose in their own time, they may lay the action either *in damnum parochianorum* or *in damnum ipsorum;* but if in the time of their predecessors, they must lay it only *in damnum parochianorum* (*f*).

It can scarcely be necessary to mention that the above observations as to the proper parties to sue cannot apply to cases of specific contracts entered into by churchwardens. In all such cases the churchwardens who entered into the contracts are, of course, the proper persons to sue and be sued (*g*).

At the end of their year, or within a month at most, the

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marriages in the marriage registry book are to be transmitted by the minister four times a year to the superintendent registrar: 6 & 7 Will. 4, c. 85, s. 33.

(*d*) *Dent* v. *Prudence and Bond,* Str. 852; *Marriott* v. *Tarpley,* 9 Sim. 297. See also 1 Chitty's "Burn's Justice," vol. 1, p. 690; and Anderdon on Churchwardens, 237; also *Williams* v. *George and Nunn,* 3 Curt. 343; *R.* v. *Bidwell,* 1 Den. C. C. 223; 17 L. J. M. C. 99.

(*e*) *Attorney-General* v. *Roper,* 2 Peere W. 126; *Dent* v. *Prudence and Bond,* Str. 852; *Hadman* v. *Ringwood,* Cro. Eliz. 179.

(*f*) See Tyrwhitt's Prid. 132; Finch's Law, 178; Cro. Eliz. 179; Comb. 417; 1 Vent. 89.

(*g*) See *ante,* p. 86.

outgoing churchwardens are, before the vestry (*a*), to give up a just account of such money as they have received, and also what particularly they have bestowed in reparations and otherwise for the use of the church (*b*).

This accounting is to be made before the vestry, in order that all who are interested and have a right to attend may be present, to take an account how the money has been expended. The vestry must of course be duly summoned; and when the account is allowed it is to be entered in the church book of accounts, which every parish is to have for this purpose; and those who allow the account are there to set their hands to it (*c*). If there be any money remaining over, the old churchwardens are to deliver it with the said book of accounts to the succeeding churchwardens, to be put by them to the account of the next year (*d*); if their receipts fall short of their disbursements, the succeeding churchwardens may pay the balance, and account it among their disbursements, at the end of the next year (*e*); but this is to be understood only of such disbursements as were sanctioned by the parish, not merely before they were made, but also before the debts in discharge of which they were made were respectively incurred, or, at least, within the current year in which they were incurred; for it is

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(*a*) This may be before a select vestry: *Butt* v. *Watkinson*, Lutw. 1027; Gibb. 216; and see p. 27.

(*b*) Can. 80; Prid. 136. As to the auditing of the accounts of the churchwardens in reference to the receipt and expenditure of money levied under the provisions of Acts of parliament for the payment of money due on the security of church rates, see the third section of "The Compulsory Church Rate Abolition Act, 1868," *ante* p. 89.

(*c*) Prid. 137; Barl. 105.

(*d*) Prid. 137. That they have no lien on these books, or indeed on any of the church goods for money expended by them for the use of the parish, see *Moss* v. *Thorniley*, 27 L. T. 161, Q. B.

(*e*) Prid. 137; 1 Roll. Abr. 121.

illegal in the churchwardens to expend their money, or to incur debt without such sanction, and if they do they have at law no claim upon the parish for reimbursement (*f*).

The exceptions against a churchwarden's account may be, *first*, as to the particulars on which the disbursements are made; and, *secondly*, as to the justness and truth of the disbursements themselves (*g*).

For if a churchwarden hath of his own head laid out the parish money, when he hath no authority by his office so to do, that is on new erections, or other such particulars, where the consent of the parish, or license of the ordinary, or both, ought first to be had, the parish may refuse to allow it him in his own accounts; and he may be further punished by the ordinary for the contempt put upon his authority herein, if it be in a particular where his license was requisite for the doing of it (*g*).

And although his disbursements be within the limits and power of his office, yet if not fairly stated, there lies a just exception against the account; and if it appears that he hath not dealt justly and fairly with the parish herein, but hath either charged to them more than he hath laid out, or falsely and fraudulently expended more than necessary for by-ends of his own, although there be no remedy against a foolish and indiscreet churchwarden, yet there is against a false and a knavish one, and such a one shall not only be defalcated all those particulars in his account where the

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(*f*) *Lanchester* v. *Frewer*, 2 Bing. 361; 9 Moore, 688, S. C.; *Northwaite* v. *Bennett*, 2 C. & M. 316; 4 Tyr. 236, S. C.; *Chesterton and Hutchins* v. *Farlar*, 1 Curt. 315; *Miller and Sims* v. *Palmer and Kilby*, 1 Curt. 540; *ante*, c. 3, s. 2. That they may lawfully discharge an unforeseen debt incurred by the previous churchwardens out of the balance handed over to them by their predecessors, see *R.* v. *Read and others*, 13 Q. B. 524; *ante*, p. 274.

(*g*) Prid. 139.

fraud appears, but may also be punished by the ordinary as one that hath notoriously broken his trust, and violated the oath of his office by his knavery and falseness therein (*a*).

And it will be a strong argument against churchwardens of their guilt in this particular, if they accept of any entertainment from the workmen they employ, or the persons of whom they buy the materials; or if they make use of any materials of their own, unless they call some principal inhabitants of the parish, and fairly agree with them for the price, before they convert them to the use intended; or if they employ such workmen, or buy the materials of such persons as are in their debt, and set it off by the money they were to pay to them, or make use of any other practice wherein they have a by-end and self-interest of their own, which men are too apt to prefer before the public; and whenever any such fraud is detected, it will be a just reason to condemn that particular in the account in which it is committed, or at least defalcate it to the value of the fraud which shall be discovered in it (*b*).

If the old churchwardens refuse to produce their account, they may be presented for this breach of duty by the new churchwardens at the next visitation (*c*); or proceedings may at once be taken against them to compel them to exhibit it on oath in the spiritual court (*d*); and they will be expected to produce their vouchers, or other satisfactory evidence of payment, for all sums amounting to or exceeding 40*s.* (*e*). But the spiritual court has no jurisdiction to settle the accounts (*f*), or to decide on the propriety of the

(*a*) Prid. 139, 140.
(*b*) Prid. 138.
(*c*) Chitty's "Burn's Justice," vol. i. p. 695, tit. "Churchwardens."
(*d*) Can. 89; Prid. 142.
(*e*) Prid. 142.
(*f*) *Adams* v. *Rush*, Str. 113, 974.

charges (*g*); and if they take any steps after the accounts are delivered in, it is an excess of jurisdiction, for which prohibition will be granted even after sentence (*g*).

At the same time, when the churchwardens thus pass their accounts to the parish of all money received and expended during their office, they must also give an account of the church goods committed to their charge and custody, which must be then brought forth, called over, and examined before the vestry; and after that, they are to be delivered over to their successors by bill indented, as must also the keys of the parish chest, wherein are kept what public evidences belong to the parish, to which are usually three keys, of which the minister is to keep one, and the churchwardens the other two; and when they have faithfully accounted for all these particulars, they are then fully acquitted of the said office (*h*).

For when the old churchwardens have thus fairly accounted before the vestry, and their account is allowed by the major part of them, it shall not afterwards be in the power of the minor part, much less of any single person who shall pretend to be dissatisfied, to make them account again; but in case they shall by any such be called before the ordinary for this purpose, on their alleging and making proof that they have already accounted before the vestry, this is a peremptory exception against all further process, and they must be dismissed with their charges; that is, when they are cited only in general to account (*i*). But if any fraud be charged upon them, and they be cited to answer for that, they can have no shelter or protection

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(*g*) *Leman* v. *Goulty and another*, 3 T. R. 3.
(*h*) Can. 89; Prid. 142.
(*i*) *Snowden* v. *Herring*, Bur. 289; Prid. 142, 143. See *Tiark and Fenning* v. *Hutton*, 35 L. J. Ecc. 11; 1 Ad. & Ecc. (L. R.) 270.

against it from any such plea. For no allowance of account can discharge them of any fraudulent dealings which they may have been guilty of in their office; but whenever any such are detected, they are accountable for them, and every parishioner hath a right to claim justice against them herein; and there doth not only lie a cause of *instance* against them on the part of the prosecutor for the repairing of the damages done them by the said fraud, but also a cause of *office* on the part of the judge to correct them for it. For every such fraud is a breach of the declaration which they took at their entering on their office, well and truly to discharge the same; and it is the duty of the ordinary to punish them for it, whenever by any sufficient proof they are convicted before him to have been guilty of it (*a*).

But this must be understood only of the money which the parishioners pay to the church rate. For as to the church goods, they being in an especial manner under the care of the ordinary, although all the parish have allowed the account, yet as to these, if the ordinary be dissatisfied, he may call them, *ex officio*, to account before him too; and also punish them, if he finds they have disposed of any of them on what account soever, although they have had the consent of every inhabitant of the parish for it, unless they have his consent too; for otherwise the parishioners may all combine for the saving of their purses to the church rates, to sell all the church goods and utensils to bear the parish charges (as we find sometimes done), and so leave the church without that which is necessary for the performing of the divine offices, which the ordinary is bound to prevent. For he hath, as to these, a right of trust as well as of jurisdiction, and therefore none of them are to be

(*a*) Prid. 143, 144.

disposed of, or otherwise converted to any use whatsoever, without his consent first had thereto (*b*).

Although it be the properest method to bring the churchwardens to account before the ordinary, yet, if there should be any difficulty or obstruction in coming at justice this way, it may be sought for by action at common law at the suit of the new churchwardens (*c*).

The law, however, on this subject is certainly in a very imperfect and unsatisfactory state, and attended with considerable practical difficulty. The following are the observations of the commissioners acting under the second ecclesiastical commission on this head :—

"There remains another branch of this subject deserving attention ; churchwardens are at present compellable by authority of the *Ecclesiastical Court* to produce their accounts ; but no examination of them can ever take place before that jurisdiction ; indeed, even the production of them cannot be enforced if they have been passed by the vestry. If the vestry refuse to sanction any of the disbursements as extravagant or unconnected with the church, there is no practicable remedy against the churchwardens ; even the recovery of moneys remaining in their hands cannot be easily accomplished. We think it would be advisable to assimilate churchwardens in all these respects to overseers of the poor" (*d*).

(*b*) Prid. 144, 145. See, however, *Method* v. *Winn*, 1 Roll. Abr. 393, *ante*, p. 363, and *Martin and Wife* v. *Watkin and others*, 2 P. Wms. 268, *ante*, p. 363, n. (*e*).

(*c*) Prid. 144 ; 1 Roll. Abr. 121 ; *Astle and another* v. *Thomas and another*, 2 B. & C. 271.

(*d*) Eccl. Law Rep. 48.

APPENDIX.

58 GEO. III. Cap. 69.

An Act for the Regulation of Parish Vestries.

[3rd June, 1818.]

WHEREAS it is expedient to regulate the manner of holding parish vestries, and the right of voting therein: May it please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, that from and after the first day of July, one thousand eight hundred and eighteen, no vestry or meeting of the inhabitants in vestry of or for any parish shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel on some Sunday during or immediately after divine service, and by affixing the same, fairly written or printed, on the principal door of such church or chapel.

Three days' notice to be given of vestries, by publication in the church and affixing on the church door.

II. And for the more orderly conduct of vestries, be it further enacted, that in case the rector or vicar or perpetual curate shall not be present, the persons so assembled in pursuance of such notice shall forthwith nominate and appoint, by plurality of votes, to be ascertained as hereinafter is directed, one of the inhabitants of such parish to be the chairman of and preside in every such vestry; and in all cases of equality of votes upon any question arising therein, the chairman shall (in addition to such vote or votes as he may by virtue of this Act be entitled to give in right of his assessment) have the casting vote; and minutes of the proceedings and resolutions of every vestry shall be fairly and distinctly entered in a book (to be provided for that purpose by the churchwardens and overseers of the poor), and shall be signed by the chairman, and by such other of the inhabitants present as shall think proper to sign the same.

Chairman of vestries to be appointed.

Chairman to have the casting vote.

Minutes to be entered and signed.

III. And be it further enacted, that in all such vestries every inhabitant present who shall, by the last rate which shall have been made for the relief of the poor, have been assessed and

Manner of voting in vestries.

charged upon or in respect of any annual rent, profit, or value not amounting to fifty pounds, shall have and be entitled to give one vote and no more; and every inhabitant there present, who shall in such last rate have been assessed or charged upon or in respect of any annual rent or rents, profit or value amounting to fifty pounds or upwards (whether in one or more than one sum or charge), shall have and be entitled to give one vote for every twenty-five pounds of annual rent, profit, and value upon or in respect of which he shall have been assessed or charged in such last rate, so nevertheless that no inhabitant shall be entitled to give more than six votes; and cases where two or more of the inhabitants present shall be jointly rated, each of them shall be entitled to vote according to the proportion and amount which shall be borne by him of the joint charge; and where one only of the persons jointly rated shall attend, he shall be entitled to vote according to and in respect of the whole of the joint charge.

Inhabitants coming into a parish since the last rate may vote.

IV. Provided, and be it further enacted, that when any person shall have become an inhabitant of any parish, or become liable to be rated therein, since the making of the last rate for the relief of the poor thereof, he shall be entitled to vote for and in respect of the lands, tenements, and property for which he shall have become liable to be rated, and shall consent to be rated, in like manner as if he should have been actually rated for the same.

Inhabitants refusing payment of rates to be excluded from vestries.

V. Provided also, and it is hereby further enacted, that no person who shall have refused or neglected to pay any rate for the relief of the poor which shall be due from and shall have been demanded of him, shall be entitled to vote or to be present in any vestry of the parish for which such rate shall have been made until he shall have paid the same (*a*),

For preservation of parish books, and papers.

VI. And be it further enacted, that as well the books hereby directed to be provided and kept for the entry of the proceedings of vestries, as all former vestry books, and all rates and assessments, accounts and vouchers of the churchwardens, overseers of the poor, and surveyors of the highways, and other parish officers, and all certificates, orders of courts and of justices, and other parish books, documents, writings, and public papers of every parish, except the registry of marriages, baptisms, and burials, shall be kept by such person and persons, and deposited in such place and manner, as the inhabitants in vestry assembled shall direct; and if any person in whose hands or custody any such book, rate, assessment, account, voucher, certificate, order, document, writing, or paper shall be, shall wilfully or negligently

Penalty on retaining or injuring

(*a*) This section is explained and amended by the 3rd section of 59 Geo. III. c. 85, and expressly repealed, as having been rendered unnecessary by the last named section, by "The Statute Law Revision Act, 1873," 36 & 37 Vict. c. 91.

destroy, obliterate, or injure the same, or suffer the same to be destroyed, obliterated, or injured, or shall after reasonable notice and demand, refuse or neglect to deliver the same to such person or persons, or to deposit the same in such place as shall by the order of any such vestry be directed, every person so offending, and being lawfully convicted thereof on his own confession, by or on the oath of one or more credible witness or witnesses, by and before two of his Majesty's justices of the peace, upon complaint thereof to them made, shall for every such offence forfeit and pay such sum, not exceeding fifty pounds nor less than forty shillings, as shall by such justices be adjudged and determined; and the same shall be recovered and levied by warrant of such justices in such manner and by such ways and means as poor rates in arrear are by law to be recovered and levied, and shall be paid to the overseers of the poor of the parish against which the offence shall be committed, or to some of them, and be applied for and towards the relief of the poor thereof: provided nevertheless, that every person who shall unlawfully retain in his custody, or shall refuse to deliver to any person or persons authorized to receive the same, or who shall obliterate, destroy, or injure, or suffer to be obliterated, destroyed, or injured, any book, rate, assessment, account, voucher, certificate, order, document, writing, or paper belonging to any parish, or to the churchwardens, overseers of the poor, or surveyors of the highways thereof, may in every such case be proceeded against in any of His Majesty's courts, civilly or criminally, in like manner as if this Act had not been made.

Parish books, &c.

Recovery and application of penalty.

Not to affect other proceedings.

VII. Provided always, and be it further enacted, that all provisions, authorities, and directions in this Act contained in relation to parishes shall extend and be construed to extend to all townships, vills, and places having separate overseers of the poor and maintaining their poor separately; and that all the directions and regulations herein contained in regard to vestries shall extend and be applied to all meetings which may by law be holden of the inhabitants of any parish, township, vill, or place, for any of the purposes in this Act expressed; and that the notices by this Act required to be given of every vestry may, in places in which there is or shall be no parish church or chapel, or where there shall not be divine service in such church or chapel, be given and published in such manner as notices of the like nature shall have been there usually given and published, or as shall be more effectual for communicating the same to the inhabitants of every such parish, township, vill, or place respectively.

Provisions in relation to parishes extended to townships, &c.

Manner of giving notices of vestries and meetings in special cases.

VIII. Provided also, and be it further enacted, that nothing in this Act contained shall extend or be construed to extend to alter the time of holding any vestry, parish or town meeting which is by the authority of any Act required to be holden on any certain

Not to alter the time for holding vestries; nor to affect

special vestries specially directed.

day, or within any certain time in such Act prescribed and directed; nor shall anything in this Act contained extend to take away, lessen, prejudice, or affect the powers of any vestry or meeting holden in any parish, township, or place, by virtue of any special Act or Acts, or any ancient or special usage or custom, or to change or affect the right or manner of voting in any vestry or meeting so holden.

Not to extend to London;

IX. Provided always, and be it enacted, that nothing in this Act contained shall extend to any parish within the city of London.

nor to Southwark.

X. Provided always, and be it further enacted, that nothing in this Act contained shall extend to any parish in the borough of Southwark.

To extend only to England and Wales.

XI. And be it further enacted, that this Act shall extend only to that part of the United Kingdom called England and Wales; and that the same shall be a public Act, and be judicially taken notice of as such by all judges, justices and others, without specially pleading the same.

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59 GEO. III. Cap. 85.

An Act to amend and correct an Act of the last Session of Parliament, for the Regulation of Parish Vestries in England. [7th July, 1819.]

58 G. 3, c. 69.

Whereas an Act was passed in the last session of parliament intituled "An Act for the Regulation of Parish Vestries," and it is expedient to amend the same; be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this Act, any person who shall be assessed and rated for the relief of the poor in respect of any annual rent, profit, or value arising from any lands, tenements, or hereditaments situate in any parish in which any vestry shall be holden under the said recited Act, although such person shall not reside in or be an inhabitant of such parish, shall and may lawfully be present at such vestry, and such person shall have and be entitled to give such and so many vote or votes at such vestry, in respect of the amount of such rent, profit, or value, as by the said Act any inhabitant of such parish present at such vestry might or ought to have and be entitled to give in respect of such amount, and to all intents and purposes as if such person were an inhabitant in such parish; anything in the said recited Act to the contrary in anywise notwithstanding.

Persons rated to the poor, though not parishioners, may vote in vestry according to the value of the premises rated.

II. And be it further enacted, that in all cases where any corporation or body politic or corporate or company shall be charged to the rate for the relief of the poor of such parish, either in the name of such corporation or of any officer of the said corporation, it shall and may be lawful to the clerk, secretary, steward, or other agent duly authorized for that purpose, of such corporation or body politic or corporate or company, to be present at any vestry to be holden in the said parish under the said recited Act; and such clerk, secretary, steward, or agent shall be entitled to give such and so many vote or votes at such vestry, in respect of the amount of the rent, profit, or value of such lands, tenements, or hereditaments, as by the said Act any inhabitant assessed to such rate present at such vestry might or ought to have and be entitled to in respect of such amount; anything in the said recited Act to the contrary in anywise notwithstanding.

Clerk or agent or corporation, &c., may vote in vestry according to the value of the premises rated.

III. And whereas by the said Act it was intended to be enacted, that no person should be present at or vote at any vestry who should have refused to pay any assessment that had become due and had been demanded of such person, but the word "and" was by mistake so inserted in the said Act as to make the same in that respect ambiguous; now to rectify such mistakes, be it further enacted, that no person who shall have refused or neglected to pay any rate for the relief of the poor, which shall be due from and shall have been demanded of him, shall be entitled to vote or to be present in any vestry of the parish for which such rate shall have been made, until be shall have paid the same; nor shall any such clerk, secretary, steward, or agent be entitled to be present or to vote, nor shall be present or vote at any vestry in such parish, unless all rates for the relief of the poor which shall have been assessed and charged upon or in respect of the annual rent, profit, or value in right of which any such clerk, secretary, steward, or agent shall claim to be present and vote, which shall be due, and which shall have been demanded at any time before the meeting of such vestry, shall have been paid and satisfied (*a*).

Non-payment of rates to disqualify from being present or voting in vestry.

(*a*) That rates which have become due less than three months previously to a vestry meeting are not now required to be paid before voting, *see* 16 & 17 Vict. c. 65, the substance of which statute is set forth in the body of the work, page 111.

1 & 2 WILL. IV. Cap. 60.

An Act for the better Regulation of Vestries, and for the Appointment of Auditors of Accounts in certain Parishes of England and Wales. [20th October, 1831.]

Whereas it is expedient to provide for the election of vestries, and of auditors of parish accounts, in certain parishes of England and Wales: be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled,

Act may be adopted by any parish.

and by the authority of the same, that this Act and the several provisions thereof shall apply to and may be adopted, under and subject to the regulations herein contained, by any parish or parishes in England and Wales.

Manner of adopting it in parishes where inhabitants do not assemble in open vestry.

II. And be it further enacted, that when in any parish certain of the ratepayers thereof may desire that the said parish should come under the operation of this Act, then and in that case any number of ratepayers amounting at least to one-fifth of the ratepayers of such parish, or any number of ratepayers amounting at least to fifty parishioners, may, on some day between the first day of December and the first day of March, deliver a requisition, by them signed, and describing their places of residence, to the churchwardens, or to one of them, serving for the said parish, requiring of the said churchwardens to ascertain according to the manner hereinafter mentioned whether or not a majority of the ratepayers of the said parish do wish and require that this Act and the provisions thereof should be adopted therein; and which requisition may be in the form or to the tenor and effect following: (that is to say),—

Form of requisition.

"To the churchwardens of the parish of [*here insert the name of the parishes.*]

"We, whose names are hereunto subscribed, being ratepayers "resident in the said parish, and respectively rated or assessed to "the relief of the poor thereof, do hereby require you the said "churchwardens to ascertain and determine the adoption or non-"adoption of an Act of the second year of the reign of King "William the Fourth, chapter ———, intituled 'An Act' [*here "inserted the title of the Act.*]

"Dated this —— day of —— in the year of our Lord ——."

Upon receipt of requisition churchwardens to

III. And be it further enacted, that the said churchwardens of the said parish shall on the first Sunday in the month of March next after the receipt of such requisition, affix or cause to be affixed a notice to the principal doors of every church or chapel

within the said parish, specifying some day not earlier than ten days and not later than twenty-one days after such Sunday, and at what place or places within the said parish the ratepayers are required to signify their votes for or against the adoption of this Act; which votes shall be received on three successive days, commencing at eight of the clock in the forenoon, and ending at four of the clock in the afternoon of each day; and the said notice shall be to the following effect:— give notice of time and place for receiving votes.

"The churchwardens of this parish [*insert here the name of* "*the parish*] having received a requisition duly signed according "to the provisions of an Act of the second year of the reign of "William the Fourth, chapter ——, for the better regulation "of vestries, the ratepayers of this parish of [*insert here the name* "*of the parish*] are hereby required, all and each of them, on "the —— day of —— next, and the two following days, to "signify to the said churchwardens by a declaration, either "printed or written, or partly printed or partly written, addressed "and delivered to one of the churchwardens at [*insert here the* "*place,*] their votes for or against the adoption of the aforesaid "Act for the better regulation of vestries by the ratepayers of "this parish. Form of notice.

"(Signed) Churchwardens."

IV. And be it further enacted, that the said declaration shall be to the following effect:—

"I, *A. B.* of —— street [*or* —— place *or* house] in this "parish of ——, vote [for *or* against, *as the case may be*] the "adoption of the Act of the second year of the reign of William "the Fourth, chapter ——, for the better regulation of vestries "by this parish." Form of declaration.

V. And be it further enacted, that the said churchwardens shall carefully examine the votes to them delivered as aforesaid, and shall compare them with the last rate, made for the relief of the poor of the said parish, and shall be empowered to call before them and examine any parish officer touching the said votes, or any ratepayer so giving his vote, and after a full and fair summing up of the said votes shall, by public notice according to the form and manner hereinafter prescribed, declare whether or not two-thirds of the votes given have been given in favour of the adoption of the said Act: provided always, that the whole number of persons voting shall be a clear majority of the ratepayers of the parish: provided also, that the adoption or non-adoption of this Act shall be decided by such number of votes as aforesaid. Churchwardens to declare whether the votes are in favour of adopting this Act.

VI. Provided always, and be it further enacted, that any of the ratepayers of the aforesaid parish, not exceeding five together, may inspect, at or in the vestry room, or in some convenient Ratepayers may inspect votes.

place within the same parish, and they are hereby empowered to inspect the votes so given for and against the adoption of this Act, at all seasonable times within one month after such notice shall have been given; and the churchwardens of the said parish are hereby required carefully to preserve the said votes, and freely to permit and allow the examination thereof by the aforesaid ratepayers of the said parish at such seasonable times within the period aforesaid.

No person to vote unless he has been rated one year.

VII. Provided always, and be it enacted, that no person shall be deemed a ratepayer, or be entitled to vote, or do any other act, matter or thing as such under the provisions of this Act, unless he or she shall have been rated to the relief of the poor for the whole year immediately preceding his so voting or otherwise acting as such ratepayer, and shall have paid all the parochial rates, taxes, and assessments due from him or her at the time of so voting or acting, except such as have been made or become due within the six months immediately preceding such voting.

Notice of adoption of the Act.

VIII. And be it further enacted, that notice of the adoption of this Act by any parish shall be forthwith given by the churchwardens for the time being of the said parish in the *London Gazette*, and in one or more of the public newspapers circulating in the county in which the said parish may be situated, and by affixing a notice of the same to the principal doors of every church and chapel within the said parish; which notice shall be to the following effect:—

"Parish of [*here insert the name of the parish*].

"Notice is hereby given that the above-named parish has "adopted the Act of the second year of the reign of King "William the Fourth, chapter ——, intituled 'An Act' [*here "insert the title of the Act*]; and that the numbers of the "majority and minority of votes given for and against the adop- "tion of the said Act are as follows (that is to say), —— votes "for the adoption thereof, and —— votes against the adoption "thereof.

"Dated this —— day of —— in the year of our Lord ——.

"(Signed) Churchwardens."

No similar requisition to be made within three years.

IX. Provided always, and be it further enacted, that if the ratepayers shall determine, in the manner as aforesaid, against the adoption of this Act, then and in that case it shall not be lawful to make another requisition for the same purposes within three years after such determination.

This Act to take effect

X. And be it further enacted, that in any parish in which public notice of the adoption of this Act in the manner as afore-

said shall be so made and given, this Act shall immediately become the law for electing vestrymen and auditors of accounts of the said parish in manner hereinafter mentioned. in all parishes in which its adoption has been notified.

XI. And be it further enacted, that if any churchwarden, rate collector, overseer, or other parish officer shall refuse to call meetings according to the provision of the Act, or shall refuse or neglect to make and give the declarations and notices directed to be made and given by this Act, or to receive the vote of any ratepayer as aforesaid, or shall in any manner whatsoever alter, falsify, conceal, or suppress any vote or votes as aforesaid, such churchwarden, rate collector, overseer, or other parish officer shall be deemed and taken to be guilty of a misdemeanor. Penalties on churchwardens and others refusing to call meetings, &c.

XII. And be it further enacted, that on some Sunday, at least twenty-one days previously to the day of annual election of vestrymen, notice of election pursuant to this Act, signed by the churchwardens, shall be affixed to the principal doors of every church and chapel of the said parish, and at other usual places, on the following terms:— Notices of election to be given.

"Parish of [*here insert the name of parish*].

"The parishioners duly qualified according to the provisions of "the Act of the second year of the reign of King William the "Fourth, intituled 'An Act' [*here insert the title of the Act*], "are hereby required to meet at —— on the —— day of —— "conformably to the provisions of the said Act, and then and "there to consider of and elect fit and proper persons to be "vestrymen and auditors of accounts of the parish of —— for "the ensuing year: that is to say,—

" Members of the vestry.
" Auditors of account."

XIII. And be it further enacted, that the churchwardens may summon the rate collectors to attend them on the said day of annual election, in order to assist them in ascertaining that the persons presenting themselves to vote are parishioners rated to the relief of the poor of the said parish, and duly qualified to vote at the said election. Rate collectors, &c., may be summoned to assist at the election.

XIV. And be it further enacted, that on the day of annual election for vestrymen and auditors in any parish adopting this Act, each parishioner then rated, and having been rated to the relief of the poor one year, desirous of voting, do meet at the place appointed for such election, then and there to nominate eight ratepayers of the said parish as fit and proper persons to be inspectors of votes, four of such eight to be nominated by the churchwardens, and the other four to be nominated by the meeting; and after such nomination the said parishioners shall elect Form of proceeding at annual elections.

such parishioners duly qualified as may be there proposed for the offices of vestrymen and auditors; and the chairman shall at such meeting declare the names of the parishioners who have been elected by a majority of votes at such meeting.

A ballot may be demanded.

XV. Provided always, and be it further enacted, that any five ratepayers may then and there, in writing or otherwise, demand a poll, which shall be taken by ballot, each ratepayer delivering to the aforesaid inspectors two folded papers, one of which papers shall contain the names of the persons for whom such parishioner may vote as fit and proper to be members of the vestry, and the other shall contain the names of the persons for whom such parishioner may vote as fit and proper to be auditors of accounts: provided always, that each ratepayer shall have one vote and no more for the members of the vestry, and one vote and no more for the auditors of accounts to be chosen in the said parish.

Mode of voting.

XVI. And be it further enacted, that the inspectors of votes shall deposit the said folded lists, without previously opening the same, in two separate sets of balloting glasses or boxes; one set for the vestry lists, and another for the auditors' lists; and that the said balloting glasses or boxes shall be closed at the time fixed for the termination of the voting, that is, at four of the clock of the afternoon of the last day of election.

Duty of inspectors.

XVII. And be it further enacted, that after the close of the said ballot the aforesaid inspectors shall proceed to examine the said votes, and if necessary shall continue the examination by adjournments from day to day not exceeding four days, Sunday excepted, until they shall have decided upon the persons duly qualified according to the provisions of this Act who may have been chosen to fill the aforesaid offices.

In case of equality of votes.

XVIII. And be it further enacted, that if an equality of votes shall appear to the aforesaid inspectors to be given for any two or more persons to fill any or either of the said offices, in that case the inspectors shall decide by lot upon the person or persons so to be chosen.

Penalty for forging or falsifying any voting list, or obstructing the election.

XIX. And be it further enacted, that if any person do forge or in any way falsify any name or writing in any paper or list purporting to contain the vote or votes of any parishioner as aforesaid so voting for vestrymen or auditors, or do by any contrivance attempt to obstruct or prevent the purposes of such mode of election, the persons so offending shall, upon information laid, and conviction before any two or more justices of the peace, having jurisdiction in the parish so adopting this Act, be liable to a penalty of not less than ten and not more than fifty

pounds, and in default of payment thereof shall be imprisoned for a term not exceeding six nor less than three months; and any fine so levied shall be given, half to the informer who shall have informed against the person so offending, and the other half to the poor of the parish in which the said offence shall have been committed.

Public notice to be given of vestrymen and auditors chosen by parishioners.

XX. And be it further enacted, that the aforesaid inspectors shall, immediately after they shall have decided upon whom the aforesaid elections have fallen, deliver to the churchwardens, or to one of them, serving for the parish so adopting this Act, a list of the persons chosen by the parishioners to act as vestrymen and auditors of accounts; and the said list or a copy thereof, shall be affixed to the doors of the churches and chapels or other places chosen for the purpose of public notice in the said parish.

Penalty on inspector for making incorrect return.

XXI. And be it further enacted, that if any inspector as aforesaid shall wilfully make or cause to be made an incorrect return of the said votes, every such offender shall, upon information laid by any person before two or more justices of the peace having jurisdiction in the said parish, and upon conviction for such offence, be liable to a penalty of not less than twenty-five pounds and not exceeding fifty pounds.

Elections to be annual.

XXII. And be it further enacted, that in all parishes adopting this Act the meeting of parishioners for the election of the vestrymen and auditors of accounts by the parishioners shall take place in the month of May in every year: provided always, that when a ballot is demanded at such election the same shall commence on the following day, and continue for three successive days, commencing at eight of the clock in the forenoon and closing at four of the clock in the afternoon on each day: provided also, that the day on which such elections shall commence shall in the first instance be appointed by the churchwardens of the parishes adopting this Act, but in every subsequent year be appointed by the vestry: provided always, that when by reason of the populousness of any parish the said parish shall have been or shall be divided into districts for ecclesiastical or other purposes, then and in that case the said votes shall be taken according to the aforesaid mode of election, in some convenient place, at the discretion of the churchwardens, in each of the several districts of the said parish.

Vestry to consist of not less than 12 nor more than 120 householders.

XXIII. And be it further enacted, that in all parishes adopting this Act the vestry appointed and elected as hereinbefore mentioned shall, when the said Act shall come into full effect consist of a certain number of resident householders; that is to say, twelve vestrymen for every parish in which the number

of rated householders shall not exceed one thousand, and twelve other additional vestrymen, that is, twenty-four vestrymen, for every parish in which the rated householder shall exceed one thousand; and twelve other additional vestrymen, that is, thirty-six vestrymen, for every parish in which the rated number of householders shall exceed two thousand; and so on at the proportion of twelve additional vestrymen for every thousand rated householders: provided always, that in no case the number of vestrymen shall exceed one hundred and twenty: provided always, that in any parish wherein the greater number of vestrymen are given by special Act of parliament than the proportions aforesaid will amount to, that then the number of vestrymen shall remain the same as given by such Act of parliament; and provided always, that the rector, district rectors, vicar, perpetual curate, and churchwardens of the said parish shall constitute a part of the said vestry, and shall vote therein, in addition to the vestrymen as aforesaid elected under this Act: provided always, that no more than one such rector or other such minister as aforesaid, from any one parish or ecclesiastical district as aforesaid, shall *ex-officio* be a part of or vote at any vestry meeting.

Proportions of existing vestry to go out of office at each of three first elections under this Act.

XXIV. And be it further enacted, that at the first election for vestrymen after the adoption of this Act in any parish, one-third of the then existing vestry, or the nearest number thereto, but not exceeding the same, shall retire from office (such portion to be determined by lot), and the parishioners duly qualified shall elect a number of vestrymen equal to one-third of the vestry, to be chosen according to the provisions of this Act; and that on the next ensuing annual election for vestrymen one-half, or as nearly as may be one-half, of the remaining part of the first aforesaid vestry shall retire from office (such portion to be determined by lot), and the parishioners duly qualified shall again elect a number of vestrymen equal to one-third of the vestry, to be chosen according to the provisions of this Act; and that on the next, that is to say, the third annual election for vestrymen, the last remaining portion of the vestry as aforesaid shall retire from office, and the parishioners duly qualified shall elect vestrymen in like manner and number as at the two preceding elections, so as to fill up the vestry to the exact number of vestrymen prescribed by this Act.

Vestrymen to quit office after three years, and one-third of the whole number to be elected annually.

XXV. And be it further enacted, that at every subsequent annual election those vestrymen who have been three years in office shall go out of office, and the parishioners shall elect, according to the provisions of this Act, other vestrymen, to the number of one-third of the total number of which such vestry shall consist, as also fill up any vacancies which may have have occurred from death or other causes: provided always, that any or all of the vestrymen so going out by rotation may be immediately eligible for re-election.

Qualification of vestrymen.

XXVI. And be it further enacted that the vestry elected under this Act in any parish not within the metropolitan police district or the city of London shall consist of resident householders rated or assessed to the relief of the poor upon a rental of not less than ten pounds; and no person shall be capable of acting as one of the said vestry unless he shall be the occupier of a house, lands, tenements, or hereditaments rated or assessed upon the aforementioned amount of rental within the parish for which he is to serve: provided always, that if the parish adopting this Act should be within the metropolitan police district or the city of London, or if the resident householders therein should amount to more than three thousand, then and in that case the vestry elected under this Act shall consist of resident householders rated or assessed to the relief of the poor of such parish upon a rental of not less than forty pounds per annum.

Vestries appointed after the adoption of this Act to exercise the authority of former vestries.

XXVII. And be it further enacted, that from and after the adoption of this Act in any parish the vestry shall exercise the powers and privileges held by any vestry now existing in such parish, and the authorities of such vestry may be pleaded before any justice or justices of the peace, or in any court of law, in regard to all parochial property, or moneys due, or holdings or contracts, or other documents of the like nature, formerly under the control or in the keeping of the vestry of the said parish; and all parish officers or boards shall account to them in like manner as they have accounted to the said vestry: provided always, that nothing in this Act shall be deemed, construed, or taken to repeal, alter, or invalidate any local Act for the government of any parish by vestries, or for the management of the poor by any board of directors and guardians, or for the due provision for divine worship within the parish, and the maintenance of the clergy officiating therein, otherwise than is by this Act expressly enacted regarding the election of vestrymen and auditors of accounts.

Not to affect local Acts regarding vestries, divine worship, &c., except as herein expressed.

The act of a quorum of the vestry at any meeting to be considered as the acts of the vestry.

XXVIII. And be it further enacted, that all powers or duties to be performed by the vestry of any parish adopting this Act may be exercised and performed respectively by the major part of such vestry assembled at any meeting, there being not less than five vestrymen present at a meeting of a vestry which consists of twelve or more elected vestrymen and not exceeding twenty-three, and not being less than seven vestrymen present at a meeting of a vestry which consists of twenty-four or more elected vestrymen and not exceeding thirty-five, and not being less than nine vestrymen present at a meeting of a vestry which consists of thirty-six elected vestrymen or upwards; and all orders and directions given, and all contracts and engagements entered into by the vestrymen present at any such meeting, or the major part of them then assembled, shall be as valid and effectual as if the

same were done by all the said vestrymen for the time being, and shall be binding and conclusive on such vestrymen, provided that the same is confirmed at the next subsequent meeting of the vestry.

Meetings not to be held in the church.

XXIX. And be it further enacted, that in any case in which the vestry-room of any parish in any city or town shall not be sufficiently large and commodious for any vestry meeting, such meeting shall be held elsewhere within the said parish or place, but not in the church or chapel thereof.

Meeting to elect a chairman.

XXX. And be it further enacted, that at any meeting of any vestry, in the absence of the persons authorized by law or custom to take the chair, the members present shall elect a chairman for the occasion before proceeding to other business.

Proceedings to be entered in books to be open to inspection.

XXXI. And be it further enacted, that the vestry of every parish adopting this Act shall cause to be provided and kept a proper book or books, and proper entries to be made therein of the names of the several vestrymen who shall attend the respective meetings of the vestry, and of all orders and proceedings made or taken at such meetings: and all such books shall at all reasonable times be open to the inspection of the said vestrymen, and of any person rated or assessed to the relief of the poor of the said parish, and of creditors on the rates of the said parish, without fee or reward; and the said vestrymen, persons, and creditors, or any of them, shall and may take copies of or extracts from such books respectively, without paying anything for the same; and in case the clerk to the said vestry, or other person having the care of such books, shall refuse to permit, or shall not permit the said vestrymen or such person or creditors to inspect the same, or to take such copies or extracts as aforesaid, such clerk or other person shall forfeit and pay any sum of money not exceeding ten pounds for every such offence.

Account books to be kept, and be open to inspection.

XXXII. And be it further enacted, that the said vestry shall and they are hereby required to cause a book or books to be provided and kept, and true and regular accounts to be entered therein of all sums of money received and disbursed for or on account of parochial purposes, and of the several articles, matters, and things for which such sums of money shall have been so received and disbursed; which book or books shall at all reasonable times be open to the inspection of the said vestrymen, and of any person or persons rated to the relief of the poor of the said parish, and of any creditor or creditors on the same without fee or reward; and the said vestrymen, and persons and creditors as aforesaid, or any of them, shall and may take copies of or extracts from the said book or books, or any part or parts thereof, without paying anything for the same; and in case the clerk to the said

vestrymen, or other persons with whom such book shall remain, shall on any reasonable demand refuse to permit, or shall not permit the said vestrymen, persons, or creditors, or any of them to inspect the said book or books, or to take such copies or extracts as aforesaid, such clerk or other person as aforesaid shall forfeit and pay any sum not exceeding ten pounds for every such offence.

Auditors to be chosen annually.

XXXIII. And be it further enacted, that in any and every parish adopting this Act the parishioners duly qualified to vote for vestrymen as aforesaid shall elect five ratepayers of the said parish who shall have signified in writing their assent to serve to be auditors of accounts, which auditors shall be so elected on the first day on which the vestrymen shall be chosen after such parish shall have adopted this Act, and according to the same forms of voting as are hereinbefore prescribed for the election of the said vestry: provided always, that no person shall be eligible to fill the said office of auditor of accounts who shall not be qualified according to the provisions of this Act as hereinbefore stated, to fill the office of vestrymen of the said parish; and provided always, that no person shall be eligible to fill the said office of auditor of accounts who shall be one of the vestry for the said parish; and if any person on the day of annual election shall be chosen to be both a member of the vestry and an auditor of accounts, the said vestry at their first meeting after such election shall declare the said person incapable of acting as vestryman: provided also, that no person shall be eligible to fill the said office of auditor of accounts who shall be interested, either directly or indirectly, in any contract, office, business, or employ, or in providing or supplying any materials or articles for the parish for which he is to serve; and any person who shall be discovered, after his election, to be so interested, shall cease to be an auditor.

Qualification.

Further qualifications of auditors.

Disqualification.

Mode of audit.

XXXIV. And be it further enacted, that the aforesaid auditors of accounts shall meet twice at least in each year, at the board room of the vestry, and (a majority of the said auditors being present at such meetings) shall proceed to audit the accounts of the said vestry for the preceding half-year, in the presence of the vestry clerk; and the said vestry are hereby required by their said clerk to produce and lay before the said auditors at every such meeting a true and just statement or account in writing, accompanied with proper vouchers, of all sums of money which may have come to the hands of the said vestry or of their treasurer, and also of all moneys paid, laid out, or expended by them, or by any churchwardens, overseers, surveyors, or other person by them employed, and responsible to the said vestry since the last period up to which the accounts of the said vestry were audited; and in all parishes in which other boards shall have control over any part of the parochial expenditure, the said

auditors shall have the same power of examining the accounts and officers thereof as of examining the accounts and officers of the vestry, and shall audit the accounts of the said boards in the same manner as they audit the accounts of the said vestries.

Auditors may call for persons and books.

XXXV. And be it further enacted, that the said auditors shall have power to summon and call before them, by a writing for that purpose signed by any one of them, or by the clerk of the vestry of any parish adopting this Act, any parish officer, or other person or persons whatsoever concerned in the said accounts, and to require of him, her, or them to attend the said auditors at any meeting or adjourned meeting, and to bring with them all books of accounts, writings, papers, and documents required which may concern the said accounts, and to give such information as to the particulars of such accounts as he, she, or they shall be enabled to give; and any parish officer or other person refusing so to attend, or otherwise wilfully obstructing the purposes of such inquiry, shall be deemed guilty of a misdemeanor.

Accounts to be signed by auditors.

XXXVI. And be it further enacted, that the said accounts, when audited and approved by the said auditors, or by the major part of them, shall be by them signed in the presence of the clerk of the aforesaid vestry of any parish adopting this Act, and the said clerk of the vestry shall also affix his signature to the same; and it shall be lawful for the aforesaid auditors to subjoin such remarks thereto as to them shall seem meet.

Accounts after audit to be open to inspection.

XXXVII. And be it further enacted, that the said accounts, when so audited and signed, shall remain at the office of the clerk of the said vestry; and that the said accounts shall after such audit be open and accessible for the examination, at all reasonable times, of any person rated to the relief of the poor of the said parish, and of any creditor on the rates thereof: provided always, that nothing in this Act contained relative to the appointment and duty of auditors shall debar the parishioners from any remedy by them before possessed by the law of the land.

Abstracts to accounts to be published fourteen days after being audited.

XXXVIII. And be it further enacted, that an abstract of the accounts of all moneys received and disbursed by the vestry in any parish adopting this Act shall twice in every year, within fourteen days after the same shall have been audited in manner in this Act mentioned, be made out by the said vestry, either in writing or in print, and a copy of such abstract shall be delivered to all persons applying for the same, and rated or assessed to the relief of the poor of the said parish, such person paying one shilling for the same; and which copies the said clerk is hereby required to cause to be published either in writing or print, and distributed accordingly.

Vestry to make out and publish yearly a list of estates, charities, and bequests, &c., with the application thereof.

XXXIX. And be it further enacted, that in any parish adopting this Act, the vestry shall cause to be made out, once at least in every year, a list of the several freehold, copyhold, and leasehold estates, and of all charitable foundations and bequests, if any, belonging to the said parish and under the control of the said vestry, the said list to contain a true and detailed account of the place where such estate or charitable foundation may be situate, or in what mode and security such bequest may be invested, specifying also the yearly rental of each, and the particular appropriation thereof, together with the names of the persons partaking of their benefit (except where such benefit shall be allotted to the poor of the parish generally), and to what amount in each case, and also stating the name and description of the person in whom such estates are vested, and the names and description of the trustees for each charity: provided always, that the aforesaid list shall be open for the inspection of the ratepayers, at the office of the vestry clerk, at the same time with the accounts when audited according to the provisions of this Act.

Saving of ecclesiastical jurisdiction.

XL. Provided always, and be it further enacted, that this Act or anything therein contained shall not extend or be construed to extend to invalidate or avoid any ecclesiastical law or constitution of the Church of England, save and except so far as concerns the appointment of vestries, or to destroy any of the rights or powers belonging to the archbishops, bishops, deans, or other of the clergy of the said established church, either as individuals or as corporate bodies, or in anywise to abridge or control their ordinary jurisdiction over or relating to any matter or thing respecting the ministers thereof.

Meaning of terms used in this Act

XLI. And in order to remove doubts as to the meaning of certain words in this Act, be it enacted, that the word "justice" shall be deemed to mean justice of the peace; and that the words "person" and "party" shall be deemed to include any number of persons or parties; and that the words "justices of the peace of the county or city" shall be deemed to include justices of the peace of any division of a county, liberty, division of a liberty, precinct, county of a city, county of a town, cinque port, or town corporate; and that the word "parish" shall be deemed to include any liberty, precinct, township, hamlet, tithing, vill, extra-parochial place, or any place maintaining its own poor; and that the word "ratepayer shall include "ley-payers;" and that the meaning of the several words in this Act shall not be restricted, although the same may be subsequently referred to in the singular number or masculine gender only.

As to affixing notices.

XLII. And be it further enacted, that the words, "church or chapel," inasmuch as regards the affixing of notices as by this Act

directed, shall be deemed to include all places of religious worship according to the forms of the established church; and that in any parish or place not having a parish church or chapel as aforesaid the said notices shall be affixed to some public building within the limits of the said parish or place.

Act not to extend to parishes where not more than 800 rate-payers except in cities or towns.

XLIII. Provided always, and be it further enacted, that nothing in this Act contained shall extend to any parish not being within or being part of any city or town, in which parish there shall not be a greater number than eight hundred persons rated as householders, and having paid the rates for the relief of the poor within the year preceding that in which the provisions this Act may be desired to be put into execution within such parish.

Public Act.

XLIV. And be it further enacted, that this Act shall be deemed and taken to be a public Act, and shall be judicially taken notice of as such by all judges, justices, and others, without the same being specially pleaded.

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13 & 14 VICT. Cap. 57.

An Act to prevent the holding of Vestry or other Meetings in Churches, and for regulating the Appointment of Vestry Clerks. [5th August, 1850.]

Whereas the holding of vestry or other parochial meetings in the parish church or chapel, or in the vestry-room attached to such church or chapel, is productive of scandal to religion and other inconveniences: for remedy thereof, be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in the present parliament assembled, and by the authority of the same, that it shall be lawful for the commissioners for administering the laws for relief of the poor in England, at any time or times after the passing of this Act, upon application in writing of the churchwardens, or, where there are no churchwardens, of the overseers of any parish in England, the population whereof exceeds two thousands persons, according to the then last preceding census, such application being made pursuant to a resolution of the vestry of such parish, to make an order under their seal of office that this Act or any part thereof shall be applied to and be put in force within such parish; and a copy of such order shall be published in such newspaper or gazette, or both, as the said commissioners may direct, and shall be deposited with the churchwardens or overseers (where there are no churchwardens) of any such parish.

Poor law commissioners, upon application of churchwarden, &c., of any parish where population exceeds 2,000 may make an order to put this Act in force.

On expiration of 12 months from

II. And be it enacted, that from and after the expiration of twelve calendar months from the making and publishing of any such order, no meeting of the inhabitants of the parish for the

purpose of holding a vestry, or for any other purpose than that of divine worship, or some ecclesiastical or charitable object, or some other purpose approved by the bishop of the diocese, shall be holden in any parish church or chapel, or other consecrated church or chapel, nor in the chancel thereof, nor, except in case of urgency, and with the previous approval of the said commissioners in the vestry-room attached to such church or chapel, in any parish or place named in such order; any public or private Act of parliament to the contrary notwithstanding. the publishing of any such order certain meetings prohibited from being held in churches and chapels.

III. And be it enacted, that where any vestry or other meeting, by virtue of any statute law or custom, has heretofore been holden in the church or chapel of any parish or place named in any such order as aforesaid, or in the vestry-room of such church or chapel, any such vestry or other meeting shall from and after the making and publishing of such order be holden in such other room or place within the parish or place as shall be provided for the holding thereof in pursuance of this Act, and all acts done in such other room or place as aforesaid shall be as good, valid, and effectual in the law, to all intents and purposes whatsoever, as if such vestry meeting had been held in the vestry room of such church or chapel, or in the body of such church or chapel as aforesaid. Power to provide other places of meeting.

IV. And be it enacted, that the churchwardens and overseers, or overseers alone, as the case may require, of any parish, with the sanction of the said commissioners and of a majority of the vestry, may by agreement hire any room, or purchase or take upon lease or exchange any lands or buildings, or sell lands belonging to such parish, and invest the proceeds of such sale in the purchase of other lands and buildings, or erect suitable buildings for the purpose of holding of any vestry and other meeting for the transaction of any business of or relating to the parish; and the Lands Clauses Consolidation Act, 1845, except the parts and enactments of that Act with respect to the purchase and taking of lands otherwise than by agreement, and with respect to the recovery of forfeitures, penalties, and costs, and with respect to lands acquired by the promoters of the undertaking, but which shall not be wanted for the purpose thereof shall, in so far as the same is consistent with this Act, be incorporated with this Act; and for the purposes of this Act the expressions "the promoters of the undertaking," or "the secretary," whenever used in that Act, shall respectively mean the churchwardens and overseers, or overseers as aforesaid; and the expression "tolls or rates," whenever used in the said first-mentioned Act, shall mean moneys to be raised for the relief of the poor mentioned in this Act; and all lands and premises which shall be so purchased or taken on lease by the churchwardens and overseers or overseers as aforesaid, of any parish shall be conveyed, Power to purchase lands, &c. under 8 & 9 Vict. c. 18.

demised, and assured to such churchwardens and overseers, or overseers alone as aforesaid, and their successors in trust for the purposes of this Act, and shall be accepted, taken, and held by them as a body corporate, and the yearly rent reserved by any lease shall be chargeable upon and paid out of the moneys to be raised for the relief of the poor of any such parish, and shall be paid by the churchwardens and overseers, or overseers as aforesaid, of such parish, as such rent becomes payable; and if at any time any such rent be not paid within thirty days after it so becomes payable, and if after demand thereof in writing, the person to whom any such rent shall be payable may either recover the same from the said churchwardens and overseers, or overseers as aforesaid, with costs of suit, by action of debt in any court of law, or may levy the same by distress of the goods and chattels of any of the said churchwardens and overseers or overseers as aforesaid.

Poor law commissioners, on receipt of a resolution of the vestry authorized to require money to be borrowed for the purposes of the Act.

V. And be it enacted, that it shall be lawful for the poor law commissioners, by an order under their hands and seal, upon the receipt of a copy under the hands of the said churchwardens, or where there are no churchwardens, of the overseers of any parish, of a resolution passed at a vestry duly convened and held for the purpose, after public notice of the time and place and purpose of holding such vestry shall have been given in like manner as notices of vestry meetings are published and given, consenting to the issue of such order to direct the churchwardens and overseers, or, where there are no churchwardens, the overseers, and such churchwardens and overseers, as the case may be, are hereby required, if so directed by such order and resolution as aforesaid, to borrow any sum of money which may be required for the purposes of this Act, and to charge the poor rates of the said parish with the repayment of the sum borrowed for such purpose and the interest thereof, so nevertheless that the sum so borrowed shall be repaid by equal annual instalments not exceeding ten.

Churchwardens, &c., within one month after publication of order to convene meeting for selecting a vestry clerk.

VI. And whereas in parishes whereof the population exceeds two thousand persons as aforesaid various duties are imposed upon and required to be performed by the officers of parishes, and much business is transacted at vestry meetings, and the parish officers and vestries require the assistance of a vestry clerk in respect of such duties and business; and it is expedient that provision should be made for regulating the appointment and for the payment of such vestry clerks: be it therefore enacted, that the churchwardens or other persons to whom it belongs to convene meetings of the vestry in any such parish shall, within the space of one calendar month from and after the making and publishing of any order of the commissioners so applied for, if such order extend to the appointment of vestry clerk as aforesaid,

and also in case of any subsequent vacancy in the office of vestry clerk, within one calendar month next after such vacancy convene a meeting of the vestry of any parish named in such order for the special purpose of electing a vestry clerk, to perform such of the duties hereinafter mentioned as shall be applicable to such parish, in addition to those which are or may be imposed on vestry clerks by any Act or Acts of parliament; and public notice of such vestry, and the place of holding the same, and the special purpose thereof shall be given in the usual manner, in which notice of the meetings of the vestry is now given, at least seven days before the day to be appointed for holding such vestry; and at such meeting the vestry shall proceed to elect some fit and competent person to be vestry clerk, and the person so elected shall not be removable from office except by a resolution passed at a vestry to be called for that special purpose in the manner hereinbefore mentioned, and with the consent of the said commissioners for administering the laws for the relief of the poor in England, or by an order under the seal of the said commissioners.

Vestry clerk elected at such meeting not to be removable, except by resolution of vestry and consent of poor law board, &c.

VII. And be it enacted, that it shall be the duty of such vestry clerk, unless otherwise directed by the poor law commissioners,—

Duties of vestry clerk.

To give notice of and attend the meetings of vestry and committees appointed thereat:

To summon and attend meetings of ths churchwardens and overseers when required, and to enter the minutes thereof respectively:

To keep the account of all charity moneys which the churchwardens or overseers are authorized or are accustomed to distribute:

To keep the vestry books, and the parish deeds and documents, and the rate books and accounts which are closed, and to give copies of and extracts from the same to any person entitled thereto, such person paying for the same at the rate of fourpence for every seventy-two words or figures, and to permit any person or persons rated to the relief of the poor of the said parish, at all reasonable times, to inspect the same or any of them, on pain of dismissal for neglecting to give such copies or permit such inspection:

To make out, when required by the vestry, the church rate, and procure the same to be signed and completed, and to retain the custody thereof, and where there is no collector of poor rates or assistant overseer to make out the poor rate, and procure the same to be allowed, and to make all the subsequent entries in the rate books, and to give the notices thereof required by law:

To prepare and issue the necessary process for recovering of arrears of such rates respectively before the justices, and procure the summons to be served, and to attend the justices

thereon, and advise the churchwardens and overseers as to the recovery of such arrears:

To keep and make out the accounts of the churchwardens, and to present such account to the vestry or other legal authority, to be passed, and to examine the church rate collectors' accounts and returns of arrears:

To assist the overseers in making out their accounts (whenever required by them), and subject to the rules and regulations of the commissioners for administering the laws for the relief of the poor, to examine from time to time the accounts of the assistant overseers or collectors of poor rates, and their returns of arrears:

To attend the audit of accounts of the overseers, and conduct all correspondence arising therefrom:

To assist the churchwardens or overseers in preparing and making out all other parochial assessments and accounts, and in examining the accounts of the collectors of such assessments:

To ascertain and make out the list of persons liable to serve on juries, and to cause them to be printed and duly published, and returned to the justices:

To give the notices for claims to vote for members of parliament, and to make out lists of voters, and get the same printed and published, and duly returned according to law, and to attend the court for revising them, and to prepare, make out, and publish the burgess lists, and the lists of constables:

To make all returns required of the churchwardens or of the overseers by law or proper authority:

To advise the churchwardens and overseers in all the duties of their office; and also to perform such other duties and services of a like nature as the said commissioners for administering the laws for the relief of the poor in England, from time to time at the request of the churchwardens or overseers of any such parish, or otherwise, shall prescribe and direct to be performed by such vestry clerk.

Salary of vestry clerk to be fixed by poor law commissioners.

VIII. And be it enacted, that the amount of salary or other remuneration to be paid to the vestry clerk, as well as the days and times on which and the persons by whom the same shall be payable, shall be fixed by the said commissioners, and altered from time to time as there shall be occasion; and such salary or remuneration shall be chargeable upon and paid out of the moneys to be raised for the relief of the poor of any such parish; and, where the said commissioners shall deem requisite, such vestry clerk shall give such security and to such persons as the said commissioners shall by their order under seal direct: provided always, that where, under the provisions of any local Act or Acts of parliament, any person or persons shall be paid

for the performance of any of the duties of vestry clerk or for assisting in the performance of any of the duties of churchwardens or overseers of the poor, nothing herein contained respecting the duties of the vestry clerk shall apply to or be deemed to apply to the performance of such duties while the same are so performed, or while payment shall be made for the performance of them as aforesaid.

Churchwardens and overseers not to be discharged from performance of duty.

IX. And be it enacted, that nothing herein contained shall exempt or discharge, or be construed to exempt or discharge, any churchwarden or overseer of the poor from the performance of any duty required of him by law, nor oblige him to avail himself of the assistance of any vestry clerk to be appointed as aforesaid in the performance of his duties, unless he shall think fit so to do.

Interpretation of terms.

X. And be it enacted, that in this Act the following words and expressions shall have the several meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; (that is to say), "parish" shall mean every place having separate overseers of the poor and maintaining its own poor, and also every parish or place having a separate ecclesiastical jurisdiction, and in which the vestry shall have been heretofore constituted and held for parochial as well as ecclesiastical purposes, either separately or jointly with any other parish; "churchwardens," shall mean also chapelwardens or other persons discharging the duties of churchwardens in any parish or place as last aforesaid: "vestry" shall mean the inhabitants of the parish lawfully assembled in vestry, or for any of the purposes for which vestries are holden, except in those parishes in which there is a select vestry elected under an Act passed in the fifty-ninth year of the reign of King George the Third, intituled "An Act to amend the Laws for the Relief of the Poor," or elected under an Act passed in the second year of the reign of his late Majesty, intituled "An Act for the better Regulation of Vestries, and for the appointment of Auditors of Accounts, in certain Parishes in England and Wales," or elected under the provisions of any local Act of parliament for the government of any parish by vestries, or under or by virtue of any prescriptive custom or otherwise, in which parishes it shall mean select vestry; "lands" shall mean lands, tenements, and hereditaments, of whatsoever nature or tenure; words importing the masculine gender shall include the feminine; words of the plural number shall include the singular; words of the singular number shall include the plural.

59 Geo. 3, c. 12.

1 & 2 Will. 4, c. 60.

Act may be amended, &c.

XI. And be it enacted, that this Act may be amended or repealed by any Act to be passed in this present session of parliament.

23 & 24 VICT. Cap. 32.

An Act to abolish the Jurisdiction of the Ecclesiastical Courts in Ireland in cases of Defamation, and in England and Ireland in certain cases of Brawling.
[3rd July, 1860.]

Whereas it is expedient to abolish the jurisdiction of the ecclesiastical courts of England and Ireland over persons not in holy orders in suits for brawling, and to abolish the jurisdiction of the ecclesiastical courts of Ireland in suits for defamation, as hath already been done with respect to the like jurisdiction in England: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in the present parliament assembled, and by the authority of the same.

Jurisdiction of ecclesiastical courts in suits for defamation and brawling abolished as against persons not in holy orders. Persons in custody for defamation, &c., under orders of ecclesiastical courts, to be discharged.

Order for discharge not made until costs lawfully incurred are paid.

I. That it shall not be lawful for any ecclesiastical court in England or Ireland to entertain or adjudicate upon any suit or cause of brawling commenced after the passing of this Act against any person not being in holy orders, nor shall it be lawful for any ecclesiastical court in Ireland to entertain or adjudicate upon any suit or cause of defamation commenced as aforesaid; and in the case of every person committed or to be committed to gaol under any writ *de contumace capiendo*, issued in consequence of any proceedings before any ecclesiastical court in any cause or suit for defamation of character, or, where such person is not in holy orders, for brawling, the judge of the ecclesiastical court before whom such proceedings shall have been had shall make an order upon the officer in whose custody such person shall be at any time hereafter for discharging such person out of custody, and such officer shall on the receipt of such order forthwith discharge such person; and it shall not be necessary for such person to take any oath of future obedience to his or her ordinary: provided always, that such order shall not be made unless the costs lawfully incurred in any such suit shall have been previously paid into the registry of such ecclesiastical court; provided further, that where any such suit for brawling or defamation has been commenced before the passing of this Act, and final judgment has not been given thereupon, or where final judgment has been given, but the defendant has not been taken under a writ *de contumace capiendo* pursuant to such judgment, the court upon payment by the defendant of the costs of suit, incurred by the promoters of the office of the judge to the time of the passing of this Act, shall stay all further proceedings therein.

Penalty on persons

II. Any person who shall be guilty of riotous, violent, or indecent behaviour, in England or Ireland in any cathedral,

church, parish or district church or chapel of the Church of England and Ireland, or in any chapel of any religious denominations, or in England in any place of religious worship duly certified under the provisions of the eighty-first chapter of the statute passed in the session of parliament of the eighteenth and nineteenth years of the reign of Her present Majesty, intituled "An Act to amend the Law concerning the certifying and registering of Places of Religious Worship in England" whether during the celebration of divine service or at any other time, or in any churchyard or burial ground, or who shall molest, let, disturb, vex, or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorized to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament, or any divine service, rite, or office, in any cathedral, church, or chapel, or in any churchyard or burial ground, shall on conviction thereof before two justices of the peace be liable to a penalty of not more than five pounds for every such offence, or may, if the justices before whom he shall be convicted think fit, instead of being subjected to any pecuniary penalty, be committed to prison for any time not exceeding two months.

Persons found guilty of making a disturbance in churches, chapels, churchyards, or burial grounds. 18 & 19 Vict. c. 81.

III. Every such offender in the premises after the said misdemeanor so committed immediately and forthwith may be apprehended and taken by any constable or churchwarden of the parish or place where the said offence shall be committed, and taken before a justice of the peace of the county or place where the said offence shall have been so committed, to be dealt with according to law.

Offender may be immediately after offence committed apprehended, &c.

IV. Any person convicted as aforesaid who shall think himself aggrieved by such conviction may forthwith appeal to the next court of general or quarter sessions which shall be holden not less than twelve days after the day of such conviction for the county, riding, division, city, or borough wherein the cause of complaint shall have arisen; provided such person shall enter into a recognizance with two sufficient sureties before the convicting justices, conditioned personally to appear at the said sessions and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such recognizance being entered into, the justices shall liberate such person, and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal or the affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment.

Persons aggrieved may appeal against conviction.

V. The Act chapter four of the statute passed in the session of parliament of the fifth and sixth years of the reign of Edward

Chapter 4 of statute 5 & 6

Ed. 6 repealed.

the Sixth is hereby repealed, so far as relates to persons not in holy orders.

Act not to affect statutes of 1 Mary sess. 2, c. 3, 1 Eliz. c. 2, or s. 18 of 1 Will. & Mary, c. 18.

VI. Nothing hereinbefore contained shall be taken to repeal or alter the statute passed in the second session of the first year of the reign of Queen Mary, chapter three; or the statute passed in the first year of the reign of Queen Elizabeth, chapter two; or the eighteenth section of the statute passed in the first year of the reign of King William and Queen Mary, chapter eighteen.

Nothing to limit power of ordinary over fabric of churches, &c.

VII. Provided also, that nothing herein contained shall limit, restrain, or abolish the power possessed by the ordinary over the fabric of any church or over the churchyard or burial ground connected therewith.

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23 & 24 VICT. Cap. 51.

An Act to provide for an Annual Return of Rates, Taxes, Tolls, and Dues levied for local Purposes in England.
[23rd July, 1860.]

By the 1st section it is provided that the clerk to any corporation, justices, commissioners, district or other board, vestry, inspectors, trustees, or other body or persons authorized to levy, or to order to be levied, any of the rates, taxes, tolls or dues, mentioned in the schedule to the Act, shall make a return of the sums levied or received by or in respect of such rates, &c., and of the expenditure thereof, to one of Her Majesty's principal secretaries of state, in the month of June in every year.

By sect. 2 it is provided that such return shall be made for the latest period of twelve months preceding the month of June in each year for which the accounts of the corporation, &c., shall be made up, and shall show the amounts levied and expended respectively, with such other particulars, and in such form, as shall from time to time be ordered by such secretary of state.

By sect. 3 it is (among other things) provided, that where any such rates, &c., are levied and expended, or to be accounted for by churchwardens, chapelwardens, or any officers or persons not authorized to act as a board, such returns as thereinbefore mentioned in respect of such rates, &c., and the expenditure thereof, shall be made by such churchwardens, chapelwardens, &c., and they shall be severally liable in respect of any neglect to make the same.

By sect. 4 any clerk, treasurer, churchwarden, officer or other person required as aforesaid to make such return, who neglects so to do in the month of June in any year, is made liable to a penalty

not exceeding 20*l.* for every such offence, to be recoverable on summary conviction thereof before two justices.

Among the rates mentioned in the schedule are "church rates and chapel rates," whether made by the common law or under the Church Building Acts, or under any other Act of parliament.

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32 & 33 VICT. CAP. 41.

An Act for amending the Law with respect to the rating of Occupiers for short Terms, and the making and collecting of the Poor's Rate.

[26th July, 1869.]

WHEREAS it is expedient to amend the law relating to the collection of poor rates assessed upon occupiers of hereditaments held for short terms, and to the making and collecting of the poor rate:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:—

Occupiers of tenements let for short terms may deduct the poor rate paid by them from their rents.

I. The occupier of any ratable hereditament let to him for a term not exceeding three months shall be entitled to deduct the amount paid by him in respect of any poor rate assessed upon such hereditament from the rent due or accruing due to the owner, and every such payment shall be a valid discharge of the rent to the extent of the rate so paid.

Amount of rate payable by occupier.

II. No such occupier shall be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of the year.

Owners may agree to pay the rate, and be allowed a commission.

III. In case the ratable value of any hereditament does not exceed twenty pounds, if the hereditament is situate in the metropolis, or thirteen pounds if situate in any parish wholly or partly within the borough of Liverpool, or ten pounds if situate in any parish wholly or partly within the city of Manchester, or the borough of Birmingham, or eight pounds if situate elsewhere, and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement and to pay the poor rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him,

and to allow to him a commission not exceeding twenty-five per cent. on the amount thereof.

Vestries may order the owner to be rated instead of the occupier.

IV. The vestry of any parish may from time to time order that the owners of all ratable hereditaments to which section three of this Act extends, situate within such parish, shall be rated to the poor rate in respect of such ratable hereditaments, instead of the occupiers, on all rates made after the date of such order; and thereupon and so long as such order shall be in force the following enactments shall have effect:—

1. The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of fifteen per cent. from the amount of the rate:
2. If the owner of one or more such ratable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such ratable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding fifteen per centum from the amount of the rate during the time he is so rated:
3. The vestry may by resolution rescind any such order after a day to be fixed by them, such day being not less than six months after the passing of such resolution, but the order shall continue in force with respect to all rates made before the date on which the resolution takes effect:

Provided that this clause shall not be applicable to any ratable hereditament in which a dwelling-house shall not be included.

Owners omitting to pay rates before the fifth day of June to forfeit commission.

V. When an owner who has become liable to pay the poor rate omits or neglects to pay, before the fifth day of June in any year, any rate or any instalment thereof which has become due previously to the preceding fifth day of January, and has been duly demanded by a demand-note delivered to him or left at his usual or last known place of abode, he shall not be entitled to deduct or receive any commission, abatement, or allowance to which he would, except for such omission or neglect, be entitled under this Act, but shall be liable to pay, and shall pay, such rate or instalment in full.

Repeal of 13 & 14 Vict. c. 99, &c., so far as the same apply to the poor rate.

VI. The statute thirteenth and fourteenth Victoria, chapter ninety-nine, with respect to the rating of small tenements, and so much of any local statute as relates to the rating of owners instead of occupiers, are hereby repealed, so far as the same apply to any poor rate made after this Act comes into operation.

Constructive payment of the rate.

VII. Every payment of a rate by the occupier, notwithstanding the amount thereof, may be deducted from his rent as herein provided, and every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which as regards rating depends upon the payment of the poor rate.

Where owners omit to pay rates, the occupiers paying the same may deduct the amount from the rent.

VIII. Where an owner who has undertaken, whether by agreement with the occupier or with the overseers, to pay the poor rates, or has otherwise become liable to pay the same, omits or neglects to pay any such rate, the occupier may pay the same and deduct the amount from the rent due or accruing due to the owner, and the receipt for such rate shall be a valid discharge of the rent to the extent of the rate so paid.

Owners to give lists of occupiers and liable to penalty for wilful omission.

IX. Every owner who agrees with the overseers to pay the poor rate, or who is rated or liable to be rated for any hereditament instead of the occupier, shall deliver to the overseers, from time to time, when required by them, in writing, a list containing the names of the actual occupiers of the hereditaments comprised in such agreement, or for which he is so rated or liable to be rated; and if any such owner wilfully omits to deliver such list when required to do so, or wilfully omits therefrom or misstates therein the name of any occupier, he shall for every such omission or misstatement be liable, on summary conviction, to a penalty not exceeding two pounds.

Notice to occupiers of rates in arrear.

X. Section 28 of "The Representation of the People Act, 1867," with respect to notice to be given of rates in arrear, shall apply to occupiers of premises capable of conferring the parliamentary franchise, although the owners of such premises have become liable for the rates assessed thereon under the provisions of this Act.

Liability of owner under agreement.

XI. Where the owner has become liable to the payment of the poor rates, the rates due from him, together with the costs and charges of levying and recovering the same, may be levied on the goods of the owner, and be recovered from him in the same way as poor rates may be recovered from the occupier.

Recovery of rates unpaid by the owner.

XII. Notwithstanding the owner of any such ratable hereditament as aforesaid has become liable for payment of the poor rates assessed thereon, the goods and chattels of the occupier shall be liable to be distrained and sold for payment of such rates as may accrue during his occupation of the premises, at any time

whilst such rates remain unpaid by the owner, subject to the following provisions :—

1. That no such distress shall be levied unless the rate has been demanded in writing by the overseers from the occupier, and the occupier has failed to pay the same within fourteen days after the service of such demand :
2. That no greater sum shall be raised by such distress than shall at the time of making the same be actually due from the occupier for rent of the premises on which the distress is made :
3. That any such occupier shall be entitled to deduct the amount of rates for which such distraint is made, and the expense of distraint, from the rent due or accruing due to the owner, and every such payment shall be a valid discharge of the rent to the extent of the rate and expenses paid.

Owner may appeal against valuation list and rate.

XIII. Every owner of any hereditament for the rates of which he has become liable shall have the same right of appeal (subject to the same conditions and consequences) against the valuation lists and the poor rates as if he were the occupier thereof.

The overseers to state the period for which poor rate is made.

Proviso.

XIV. The overseers of every parish when they make a poor rate shall set forth in the title of the rate the period for which the same is estimated, and if the same is payable by instalments the amount of each instalment and the date at which each instalment is payable; provided that if the necessities of the parish shall require it another rate shall be made before such period shall have elapsed.

Overseers may make poor rate payable by instalments.

XV. The overseers who make the poor rate for a period exceeding three months may declare that the same shall be paid by instalments at such times as they shall specify, and thereupon each instalment only shall be enforceable as and when it falls due, and the payment of any such instalment shall, as respects any qualification or franchise depending upon the payment of the poor rate, be deemed a payment of such rate in respect of the period to which such instalment applies.

Provision for successive occupiers, and for occupiers coming into unoccupied hereditaments.

XVI. If the occupier assessed in the rate when made shall cease to occupy before the rate shall have been wholly discharged, or if the hereditament being unoccupied at the time of the making of the rate become occupied during the period for which the rate is made, the overseers shall enter in the rate book the name of the person who succeeds or comes into the occupation, as the case may be, and the date when such occupation commences, so far as the same be known to them, and such occupier shall thenceforth be deemed to have been actually rated from the date so entered by the overseer, and shall be liable to pay so much of

the rate as shall be proportionate to the time between the commencement of his occupation and the expiration of the period for which the rate was made, in like manner, and with the like remedy of appeal, as if he had been rated when the rate was made; and an outgoing occupier shall remain liable in like manner for so much and no more of the rate as is proportionate to the time of his occupation within the period for which the rate was made; and the twelfth section of the statute 17 Geo. 2, c. 38, shall be repealed.

When the poor rate shall be deemed to be made.

XVII. A poor rate shall be deemed to be made on the day when it is allowed by the justices, and if the justices sever in their allowance then on the day of the last allowance.

Evidence of making and publication of rates.

XVIII. The production of the book purporting to contain a poor rate, with the allowance of the rate by the justices, shall, if the rate is made in the form prescribed by law, be *primâ facie* evidence of the due making and publication of such rate.

Overseers to insert names of all occupiers in the rate.

Penalty for omission.

Saving of franchise.

XIX. The overseers in making out the poor rate shall, in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate book the name of the occupier of every ratable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid; and if any overseer negligently or wilfully and without reasonable cause omits the name of the occupier of any ratable hereditament from the rate, or negligently or wilfully misstates any name therein, such overseer shall for every such omission or misstatement be liable on summary conviction to a penalty not exceeding two pounds; provided that any occupier whose name has been omitted shall, notwithstanding such omission, and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted.

Interpretation of terms.

XX. The word "overseers" shall include every authority that makes an assessment for the poor rate; the words "poor rate" shall mean the assessment for the relief of the poor, and for the other purposes chargeable thereon according to law, and in the metropolis shall extend to every rate made by the overseers, and chargeable upon the same property as the poor rate; the word "owner" shall mean any person receiving or claiming the rent of the hereditament for his own use, or receiving the same for the use of any corporation aggregate, or of any public company, or of any landlord or lessee who shall be a minor, a married woman, or insane, or for the use of any person for whom he is acting as agent; the word "parish" shall signify every place for

which a separate overseer can be appointed; the word "vestry" shall include not only the vestry of a parish existing under the authority of some general or special Act of parliament, or by special custom or otherwise, but also the meeting of the inhabitants of any township, vill, or place having a separate overseer, and for which a separate poor rate is made, held after notice given in like manner as is required by law in regard to the meetings of vestries; and the word "metropolis" shall include only the metropolis as defined by the Metropolis Management Act, 1855.

Application of Act.

XXI. This Act shall not extend to Scotland or Ireland.

Short title.

Commencement of Act.

XXII. This Act may be cited as "The Poor Rate Assessment and Collection Act, 1869," and shall come into operation on the twenty-ninth of September one thousand eight hundred and sixty-nine: provided that the vestry of any parish may before that day order that the owners shall be rated instead of the occupiers under this Act, but no such order shall take effect until after the said twenty-ninth day of September one thousand eight hundred and sixty-nine.

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35 & 36 VICT. Cap. 35.

An Act for the Amendment of the Act of Uniformity.

[18th July, 1872.]

Whereas by the Act of Uniformity it is enacted that all and singular ministers in any cathedral, collegiate, or parish church or chapel, or other place of public worship in England, shall be bound to say and use the morning prayer, evening prayer, celebration and administration of both the sacraments, and all other the public and common prayer, in such order and form as is mentioned in the Book of Common Prayer annexed to the said Act:

And whereas in the year one thousand eight hundred and sixty-nine commissioners were appointed by Her Majesty to inquire and consider, amongst other matters, the differences of practice which have arisen from varying interpretations put upon the rubrics, orders, and directions for regulating the course and conduct of public worship, the administration of the sacraments, and the other services contained in the Book of Common Prayer, with a view of explaining or amending the said rubrics, orders, and directions so as to secure general uniformity of practice in such matters as may be deemed essential, and to report thereon from time to time, having regard not only to the said rubrics,

orders, and directions, but also to any other laws or customs relating to the matters aforesaid, with power to suggest any alterations, improvements, or amendments with respect to such matters or any of them:

And whereas the said commissioners have by their report dated the thirty-first day of August one thousand eight hundred and seventy recommended in manner therein mentioned:

And whereas Her Majesty was pleased to authorize the convocations of Canterbury and York to consider the said report of the said commissioners, and to report to Her Majesty thereon, and the said convocations have accordingly made their first report to Her Majesty:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:—

1. In this Act,— Definitions.

The term "Act of Uniformity" means the Act of the fourteenth year of the reign of King Charles the Second, chapter four, intituled "An Act for the uniformity of public prayers and administration of sacraments and other rites and ceremonies, and for establishing the form of making, ordaining, and consecrating bishops, priests, and deacons in the Church of England," and includes the enactments confirmed and applied by that Act to the Book of Common Prayer:

The term "Book of Common Prayer" means the book annexed to the said Act of the reign of King Charles the Second, and intituled "The Book of Common Prayer and administration of the sacraments and other rites and ceremonies of the Church according to the use of the Church of England, together with the Psalter or Psalms of David pointed as they are to be sung or said in churches, and the form or manner of making, ordaining, and consecrating of bishops, priests, and deacons:"

The term "cathedral" means a cathedral or collegiate church in which the Book of Common Prayer is required by the Act of Uniformity to be used:

The term "church" means any parish church, chapel, or other place of public worship which is not a cathedral as before defined, and in which the Book of Common Prayer is required by the Act of Uniformity to be used.

2. The shortened order for morning prayer or for evening prayer, specified in the schedule to this Act, may, on any day except Sunday, Christmas Day, Ash Wednesday, Good Friday, Use of shortened form of

Morning and Evening Prayer.

and Ascension Day, be used, if in a cathedral in addition to, and if in a church in lieu of, the order for morning prayer or for evening prayer respectively prescribed by the Book of Common Prayer.

Special service for special occasions.

3. Upon any special occasion approved by the ordinary, there may be used in any cathedral or church a special form of service approved by the ordinary, so that there be not introduced into such service anything, except anthems or hymns, which does not form part of the Holy Scriptures or Book of Common Prayer.

Additional service on Sundays and holy-days.

4. An additional form of service varying from any form prescribed by the Book of Common Prayer may be used at any hour on any Sunday or holy day in any cathedral or church in which there are duly read, said, or sung as required by law on such Sunday or holy day at some other hour or hours the order for morning prayer, the litany, such part of the order for the administration of the Lord's Supper or Holy Communion as is required to be read on Sundays and holy days if there be no Communion, and the order for evening prayer, so that there be not introduced into such additional service any portion of the order for the administration of the Lord's Supper or Holy Communion, or anything, except anthems or hymns, which does not form part of the Holy Scriptures or Book of Common Prayer, and so that such form of service and the mode in which it is used is for the time being approved by the ordinary; provided that nothing in this section shall affect the use of any portion of the Book of Common Prayer as otherwise authorized by the Act of Uniformity or this Act.

Separation of services.

5. Whereas doubts have arisen as to whether the following forms of service, that is to say, the order for morning prayer, the litany, and the order for the administration of the Lord's Supper or Holy Communion, may be used as separate services, and it is expedient to remove such doubts: Be it therefore enacted and declared that any of such forms of service may be used together or in varying order as separate services, or that the litany may be said after the third collect in the order for evening prayer, either in lieu of or in addition to the use of the litany in the order for morning prayer, without prejudice nevertheless to any legal powers vested in the ordinary; and any of the said forms of service may be used with or without the preaching of a sermon or lecture, or the reading of a homily.

Preaching a sermon without previous service.

6. Whereas doubts have arisen as to whether a sermon or lecture may be preached without the common prayers and services appointed by the Book of Common Prayer for the time of day being previously read, and it is expedient to remove such doubts: Be it therefore enacted and declared, that a sermon or

lecture may be preached without the common prayers or services appointed by the Book of Common Prayer being read before it is preached, so that such sermon or lecture be preceded by any service authorized by this Act, or by the bidding prayer, or by a collect taken from the Book of Common Prayer, with or without the Lord's Prayer.

Saving of 34 & 35 Vict. c. 26. s. 6.

7. Nothing in this Act shall affect the provision with respect to the chapels of colleges in the universities of Oxford, Cambridge, and Durham, which is contained in section six of the Universities Tests Act, 1871.

Effect of schedule.

8. The schedule to this Act, and the notes thereto and directions therein, shall be construed and have effect as part of this Act.

Short title.

9. This Act may be cited as "The Act of Uniformity Amendment Act, 1872."

SCHEDULE.

NOTE.—The minister using the shortened order for morning prayer or for evening prayer in this schedule, may in his discretion add in its proper place any exhortation, prayer, canticle, hymn, psalm, or lesson contained in the order for morning prayer or for evening prayer in the Book of Common Prayer and omitted or authorized to be omitted from such shortened order.

Each of the twenty-two portions into which the one hundred and nineteenth psalm is divided in the Book of Common Prayer shall be deemed, for the purposes of this schedule, to be a separate psalm.

SHORTENED FORMS OF SERVICE.

THE SHORTENED ORDER FOR MORNING PRAYER DAILY THROUGHOUT THE YEAR, EXCEPT ON SUNDAY, CHRISTMAS DAY, ASH WEDNESDAY, GOOD FRIDAY, AND ASCENSION DAY.

At the beginning of Morning Prayer the Minister shall read with a loud voice some one or more of these sentences of the Scriptures that follow.

When the wicked man, &c.

A general confession to be said of the whole congregation after the Minister, all kneeling.

Almighty and most merciful Father, &c.

The absolution, or remission of sins, to be pronounced by the Priest alone, standing; the people still kneeling.

Almighty God, the Father, &c,

The people shall answer here, and at the end of all other prayers, Amen.

Then the Minister shall kneel, and say the Lord's Prayer with an audible voice; the people also kneeling and repeating it with him.

Our Father, which art in heaven, &c.

Then likewise he shall say,

O Lord, open Thou our lips.
&c. &c. &c.

Here all standing up, the Priest shall say,

Glory be to the Father, &c.

Then shall follow one or more of the Psalms appointed. And at the end of every psalm throughout the year, and likewise at the end of Benedicite, Benedictus, Magnificat, *and* Nunc dimittis, *shall be repeated.*

Glory be to the Father, &c.

Then shall be read distinctly, with an audible voice, either the first lesson taken out of the Old Testament as is appointed in the calendar, or the second lesson taken out of the New Testament, except there be a proper lesson assigned for that day, in which case the proper lesson shall be read, and if there are two proper lessons each shall be read in its proper place; he that readeth so standing and turning himself as he may best be heard of all such as are present.

Note that before every lesson the Minister shall say, Here beginneth such a chapter, *or* verse of such a chapter, of such a book. *And after every lesson,* Here endeth the lesson, *or* the first *or* the second lesson.

And after the lesson, or between the first and second lessons, shall be said or sung in English one of the following:

Either the hymn called, Te Deum Laudamus.

We praise thee, O God, &c.

Or this Canticle, Benedicite, omnia opera.

O all ye works of the Lord, &c.

Or the Hymn following (except when that shall happen to be read in the lesson for that day, or for the Gospel on Saint John Baptist's Day):

Benedictus. St. Luke i. 68.

Blessed be the Lord God of Israel, &c.

Or this psalm:

Jubilate Deo.

O be joyful in the Lord, all ye lands, &c.

Then shall be sung or said the Apostles Creed by the Minister and the people standing,

I believe in God the Father Almighty, &c.

And after that, the people all devoutly kneeling, the Minister shall pronounce with a loud voice,

The Lord be with you.

Answer. And with thy spirit.

Minister. Let us pray.

Then the Priest shall say,

O Lord, shew thy mercy upon us,
&c. &c. &c.

Then shall follow three collects. The first of the day, which shall be the same that is appointed at the Communion; the second for peace; the third for grace to live well; and the two last collects shall never alter, but daily be said at morning prayer throughout all the year, as followeth, all kneeling.

The second collect for peace.

O God, who art the Author of peace, &c.

The third collect for grace.

O Lord, our heavenly Father, &c.

Here may follow an anthem or hymn:

Then these two prayers following:

A prayer of Saint Chrysostome,

Almighty God, who hast given us grace, &c.

2 *Corinthians*, xiii.

The grace of our Lord Jesus Christ, &c.

Here endeth the Shortened Order of Morning Prayer.

THE SHORTENED ORDER FOR EVENING PRAYER DAILY THROUGHOUT THE YEAR, EXCEPT ON SUNDAY, CHRISTMAS DAY, ASH WEDNESDAY, GOOD FRIDAY, AND ASCENSION DAY.

At the beginning of Evening Prayer the Minister shall read with a loud voice some one or more of these sentences of the Scriptures that follow:

When the wicked man, &c.

A general confession to be said of the whole congregation after the Minister all kneeling.

Almighty and most merciful Father, &c.

The absolution, or remission of sins, to be pronounced by the Priest alone, standing; the people still kneeling.

Almighty God, the Father, &c.

Then the Minister shall kneel, and say the Lord's Prayer; the people also kneeling, and repeating it with him.

Our Father, which art in heaven, &c.

Then likewise he shall say,

O Lord, open thou our lips.

Here all standing up, the Priest shall say,

Glory be to the Father, &c.

Then shall be said or sung one or more of the psalms in order as they be appointed. Then either a lesson of the Old Testament as is appointed, or a lesson of the New Testament as it is appointed, except there be a proper lesson assigned for that day, in which case the proper lesson shall be read, and if there are two proper lessons each shall be read in its proper place; and after the lesson, or between the first and second lessons, shall be said or sung in English one of the following:

Either Magnificat, *or the Song of the Blessed* Virgin Mary, *in English, as follows:*

Magnificat. St. Luke i.

My soul doth magnify the Lord, &c.

Or this psalm (except it be on the nineteenth day of the month, when it is read in the ordinary course of the psalms):

Cantate Domino. Psalm xcviii.

O sing unto the Lord a new song, &c.

Or Nunc dimittis (*or the Song of* Simeon), *as followeth:*

Nunc dimittis. St. Luke ii. 29.

Lord, now lettest thou thy servant, &c.

Or else this psalm (except it be on the twelfth day of the month):

Deus misereatur. Psalm lxvii.

God be merciful unto us, and bless us, &c.

Then shall be said or sung the Apostles Creed by the Minister and the people, standing:

I believe in God the Father Almighty, &c.

And after that, the people all devoutly kneeling, the Minister shall pronounce with a loud voice,

The Lord be with you.

Answer. And with thy spirit,

Minister. Let us pray.

Then the Priest shall say,

O Lord, shew thy mercy upon us,
&c. &c. &c.

Then shall follow three collects. The first of the day; the second for peace; the third for aid against all perils, as hereafter followeth; which two last collects shall be daily said at evening prayer without alteration.

The second collect at evening prayer.

O God, from whom all holy desires, &c.

The third collect for aid against all perils.

Lighten our darkness, &c.

Here may follow an anthem or hymn.

A Prayer of Saint Chrysostome.

Almighty God, who hast given us grace, &c.

2 *Corinthians*, xiii.

The grace of our Lord Jesus Christ, &c.

Here endeth the Shortened Order of Evening Prayer.

37 & 38 VICT. CAP. 85.

An Act for the better Administration of the Laws respecting the Regulation of Public Worship. [7th August, 1874.]

WHEREAS it is expedient that in certain cases further regulations should be made for the administration of the laws relating to the performance of divine service according to the use of the Church of England:

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as The Public Worship Regulation Act, 1874.

Commencement of Act.

2. This Act shall come into operation on the first day of July one thousand eight hundred and seventy-five, except where expressly hereinafter provided.

Extent of Act.

3. This Act shall extend to that part of the United Kingdom called England, to the Channel Islands, and the Isle of Man.

Proceedings under this Act not to be deemed proceedings under 3 & 4 Vict. c. 86, s. 23.

4. Proceedings taken under this Act shall not be deemed to be such proceedings as are mentioned in the Act of the third and fourth year of the reign of Her Majesty, chapter eighty-six, section twenty-three.

Saving of jurisdiction.

5. Nothing in this Act contained, save as herein expressly provided, shall be construed to affect or repeal any jurisdiction which may now be in force for the due administration of ecclesiastical law.

Interpretation of terms.

6. In this Act the following terms shall, if not inconsistent with the context, be thus interpreted:—

"Bishop."

The term "bishop" means the archbishop or bishop of the diocese in which the church or burial ground is situate to which a representation relates:

"Book of Common Prayer."

The term "Book of Common Prayer" means the book annexed to the Act of the fourteenth year of the reign of King Charles the Second, chapter four, intituled "The Book of "Common Prayer, and administration of the sacraments, "and other rites and ceremonies of the Church, according "to the use of the Church of England; together with the "Psalter or Psalms of David, pointed as they are to be sung "or said in churches; and the form or manner of making, "ordaining, and consecrating of bishops, priests, and

"deacons;" together with such alterations as have from time to time been or may hereafter be made in the said book by lawful authority:

"Burial ground." The term "burial ground" means any churchyard, cemetery, or burial ground, or the part of any cemetery or burial ground, in which, at the burial of any corpse therein, the order for the burial of the dead contained in the Book of Common Prayer is directed by law to be used:

"Church." The term "church" means any church, chapel, or place of public worship in which the incumbent is by law or by the terms of license from the bishop required to conduct divine service according to the Book of Common Prayer:

"Diocese." The term "diocese" means the diocese in which the church or burial ground is situate to which a representation relates, and comprehends all places which are situate within the limits of such diocese:

"Incumbent." The term "incumbent" means the person or persons in holy orders legally responsible for the due performance of divine service in any church, or of the order for the burial of the dead in any burial ground:

"Parish." The term "parish" means any parish, ecclesiastical district, chapelry, or place, over which any incumbent has the exclusive cure of souls:

"Parishioner." The term "parishioner" means a male person of full age who before making any representation under this Act has transmitted to the bishop under his hand the declaration contained in schedule (A) to this Act, and who has, and for one year next before taking any proceeding under this Act has had, his usual place of abode in the parish within which the church or burial ground is situate, or for the use of which the burial ground is legally provided, to which the representation relates:

"Barrister-at-law." The term "barrister-at-law" shall in the Isle of Man include advocate:

"Rules and orders." The term "rules and orders" means the rules and orders framed under the provisions of this Act.

Appointment and duties of judge. 7. The Archbishop of Canterbury and the Archbishop of York may, but subject to the approval of Her Majesty to be signified under Her Sign Manual, appoint from time to time a barrister-at-law who has been in actual practice for ten years, or a person who has been a judge of one of the superior courts of law or equity, or of any court to which the jurisdiction of any such court has been or may hereafter be transferred by authority of parliament, to be, during good behaviour, a judge of the provincial courts of Canterbury and York, hereinafter called the judge.

If the said archbishops shall not, within six months after the passing of this Act, or within six months after the occurrence of

any vacancy in the office, appoint the said judge, Her Majesty may by letters patent appoint some person, qualified as aforesaid, to be such judge.

Whensoever a vacancy shall occur in the office of official principal of the Arches Court of Canterbury, the judge shall become *ex officio* such official principal, and all proceedings thereafter taken before the judge in relation to matters arising within the province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury; and whensoever a vacancy shall occur in the office of official principal or auditor of the Chancery Court of York, the judge shall become *ex officio* such official principal or auditor, and all proceedings thereafter taken before the judge in relation to matters arising within the province of York shall be deemed to he taken in the Chancery Court of York; and whensoever a vacancy shall occur in the office of master of the faculties to the Archbishop of Canterbury, such judge shall become *ex officio* such master of the faculties.

Every person appointed to be a judge under this Act shall be a member of the Church of England, and shall, before entering on his office, sign the declaration in schedule (A) to this Act; and if at any time any such judge shall cease to be a member of the Church, his office shall thereupon be vacant.

This section shall come into operation immediately after the passing of this Act.

Representation by archdeacon, churchwarden, parishioners, or inhabitants of diocese.

8. If the archdeacon of the archdeaconry, or a churchwarden of the parish, or any three parishioners of the parish, within which archdeaconry or parish any church or burial ground is situate, or for the use of any part of which any burial ground is legally provided, or in case of cathedral or collegiate churches, any three inhabitants of the diocese, being male persons of full age, who have signed and transmitted to the bishop under their hands the declaration contained in schedule (A) under this Act, and who have, and for one year next before taking any proceeding under this Act have had, their usual place of abode in the diocese within which the cathedral or collegiate church is situated, shall be of opinion,—

(1.) That in such church any alteration in or addition to the fabric, ornaments, or furniture thereof has been made without lawful authority, or that any decoration forbidden by law has been introduced into such church; or,

(2.) That the incumbent has within the preceding twelve months used or permitted to be used in such church or burial ground any unlawful ornament of the minister of the church, or neglected to use any prescribed ornament or vesture; or,

(3.) That the incumbent has within the preceding twelve months failed to observe, or to cause to be observed, the directions contained in the Book of Common Prayer

relating to the performance, in such church or burial ground, of the services, rites, and ceremonies ordered by the said book, or has made or permitted to be made any unlawful addition to, alteration of, or omission from such services, rites, and ceremonies,—

such archdeacon, churchwarden, parishioners, or such inhabitants of the diocese, may, if he or they think fit, represent the same to the bishop, by sending to the bishop a form, as contained in schedule (B) to this Act, duly filled up and signed, and accompanied by a declaration made by him or them under the Act of the fifth and sixth year of the reign of King William the Fourth, chapter sixty-two, affirming the truth of the statements contained in the representation: provided, that no proceedings shall be taken under this Act as regards any alteration in or addition to the fabric of a church if such alteration or addition has been completed five years before the commencement of such proceedings.

Proceedings on representation.

9. Unless the bishop shall be of opinion, after considering the whole circumstances of the case, that proceedings should not be taken on the representation (in which case he shall state in writing the reason for his opinion, and such statement shall be deposited in the registry of the diocese, and a copy thereof shall forthwith be transmitted to the person or some one of the persons who shall have made the representation, and to the person complained of), he shall within twenty-one days after receiving the representation transmit a copy thereof to the person complained of, and shall require such person, and also the person making the representation, to state in writing within twenty-one days whether they are willing to submit to the directions of the bishop touching the matter of the said representation, without appeal; and if they shall state their willingness to submit to the directions of the bishop without appeal, the bishop shall forthwith proceed to hear the matter of the representation in such manner as he shall think fit, and shall pronounce such judgment and issue such monition (if any) as he may think proper, and no appeal shall lie from such judgment or monition.

Provided, that no judgment so pronounced by the bishop shall be considered as finally deciding any question of law so that it may not be again raised by other parties.

The parties may, at any time after the making of a representation to the bishop, join in stating any questions arising in such proceedings in a special case signed by a barrister-at-law for the opinion of the judge, and the parties after signing and transmitting the same to the bishop may require it to be transmitted to the judge for hearing, and the judge shall hear and determine the question or questions arising thereon, and any judgment pronounced by the bishop shall be in conformity with such determination.

If the person making the representation and the person complained of shall not, within the time aforesaid, state their willingness to submit to the directions of the bishop, the bishop shall forthwith transmit the representation in the mode prescribed by the rules and orders to the archbishop of the province, and the archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster.

The judge shall give not less than twenty-eight days' notice to the parties of the time and place at which he will proceed to hear the matter of the said representation. The judge before proceeding to give such notice shall require from the person making the representation such security for costs as the judge may think proper, such security to be given in the manner prescribed by the rules and orders.

The person complained of shall within twenty-one days after such notice transmit to the judge, and to the person making the representation, a succinct answer to the representation, and in default of such answer he shall be deemed to have denied the truth or relevancy of the representation.

In all proceedings before the judge under this Act the evidence shall be given *vivâ voce*, in open court, and upon oath; and the judge shall have the powers of a court of record, and may require and enforce the attendances of witnesses, and the production of evidences, books, or writings, in the like manner as a judge of one of the superior courts of law or equity, or of any court to which the jurisdiction of any such court has been or may hereafter be transferred by authority of parliament.

Unless the parties shall both agree that the evidence shall be taken down by a shorthand writer, and that a special case shall not be stated, the judge shall state the facts proved before him in the form of a special case, similar to a special case stated under the Common Law Procedure Acts, 1852–1854.

The judge shall pronounce judgment on the matter of the representation, and shall deliver to the parties, on application, and to the bishop, a copy of the special case, if any, and judgment.

The judge shall issue such monition (if any) and make such order as to costs as the judgment shall require.

Upon every judgment of the judge, or monition issued in accordance therewith, an appeal shall lie, in the form prescribed by rules and orders, to Her Majesty in Council.

The judge may, on application in any case, suspend the execution of such monition pending an appeal, if he shall think fit.

Registrar of the diocese to perform duties under the Act.

10. The registrar of the diocese, or his deputy duly appointed, shall perform such duties in relation to this Act and shall receive such fees as may be prescribed by the rules and orders.

Parties may appear in person or by counsel, &c.

11. In any proceedings under this Act either party may appear either by himself in person or by counsel, or by any proctor or any attorney or solicitor.

No fresh evidence to be admitted on appeal.

12. For the purpose of an appeal to Her Majesty in Council under this Act, the special case settled by the judge, or a copy of the shorthand writer's notes, as the case may be, shall be transmitted in the manner prescribed by rules and orders, and no fresh evidence shall be admitted upon appeal except by the permission of the tribunal hearing the appeal.

Inhibition of incumbent.

13. Obedience by an incumbent to a monition or order of the bishop or judge, as the case may be, shall be enforced, if necessary, in the manner prescribed by rules and orders, by an order inhibiting the incumbent from performing any service of the church or otherwise exercising the cure of souls within the diocese for a term not exceeding three months; provided that at the expiration of such term the inhibition shall not be relaxed until the incumbent shall, by writing under his hand in the form prescribed by the rules and orders, undertake to pay due obedience to such monition or order, or to the part thereof which shall not have been annulled; provided that if such inhibition shall remain in force for more than three years from the date of the issuing of the monition, or from the final determination of an appeal therefrom, whichever shall last happen, or if a second inhibition in regard to the same monition shall be issued within three years from the relaxation of an inhibition, any benefice or other ecclesiastical preferment held by the incumbent in the parish in which the church or burial ground is situate, or for the use of which the burial ground is legally provided, in relation to which church or burial ground such monition has been issued as aforesaid, shall thereupon become void, unless the bishop shall, for some special reason stated to him in writing, postpone for a period not exceeding three months the date at which, unless such inhibition be relaxed, such benefice or other ecclesiastical preferment shall become void as aforesaid; and upon any such avoidance it shall be lawful for the patron of such benefice or other ecclesiastical preferment to appoint, present, collate, or nominate the same as if such incumbent were dead; and the provisions contained in the Act of the first and second year of the reign of Her Majesty, chapter one hundred and six, section fifty-eight, in reference to notice to the patron and as to lapse, shall be applicable to any benefice or other ecclesiastical preferment avoided under this Act: and it shall not be lawful for the patron at any time to appoint, present, collate, or nominate to such benefice or such other ecclesiastical preferment the incumbent by whom the same was avoided under this Act.

The bishop may, during such inhibition, unless he is satisfied

that due provision is otherwise made for the spiritual charge of the parish, make due provision for the service of the church and the cure of souls, and it shall be lawful for the bishop to raise the sum required from time to time for such provision by sequestration of the profits of such benefice or other ecclesiastical preferment.

Any question as to whether a monition or order given or issued after proceedings before the bishop or judge, as the case may be, has or has not been obeyed shall be determined by the bishop or the judge, and any proceedings to enforce obedience to such monition or order shall be taken by direction of the judge.

Faculty not necessary in certain cases.

14. It shall not be necessary to obtain a faculty from the ordinary in order lawfully to obey any monition issued under this Act, and if the judge shall direct in any monition that a faculty shall be applied for, such fees only shall be paid for such faculty as may be directed by the rules and orders; provided that nothing in this Act contained shall be construed to limit or control the discretion vested by law in the ordinary as to the grant or refusal of a faculty: provided also, that a faculty shall, on application, be granted, if unopposed, on payment of such a fee (not exceeding two guineas) as shall be prescribed by the rules and orders, in respect of any alteration in or addition to the fabric of any church, or in respect of any ornaments or furniture, not being contrary to law, made or existing in any church at the time of the passing of this Act.

Service of notices.

15. All notices and other documents directed to be given to any person under this Act shall be given in the manner prescribed by rules and orders.

Substitute for bishop when patron, or in case of illness.

16. If any bishop shall be patron of the benefice or of any ecclesiastical preferment held by the incumbent respecting whom a representation shall have been made, or shall be unable from illness to discharge any of the duties imposed upon him by this Act in regard to any representation, the archbishop of the province shall act in the place of such bishop in all matters thereafter arising in relation to such representation; and if any archbishop shall be patron of the benefice or of any ecclesiastical preferment held by the incumbent respecting whom a representation shall have been made, or shall be unable from illness to discharge any of the duties imposed upon him by this Act in regard to any representation, Her Majesty may, by her sign manual, appoint an archbishop or bishop to act in the place of such archbishop in all matters thereafter arising in relation to such representation.

Provisions relating to cathedral or

17. The duties appointed under this Act to be performed by the bishop of the diocese shall in the case of a cathedral or collegiate church be performed by the visitor thereof.

collegiate church.

If any complaint shall be made concerning the fabric, ornaments, furniture, or decorations of a cathedral or collegiate church, the person complained of shall be the dean and chapter of such cathedral or collegiate church, and in the event of obedience not being rendered to a monition relating to the fabric, ornaments, furniture, or decorations of such cathedral or collegiate church, the visitor or the judge, as the case may be, shall have power to carry into effect the directions contained in such monition, and, if necessary, to raise the sum required to defray the cost thereof by sequestration of the profits of the preferments held in such cathedral or collegiate church by the dean and chapter thereof.

If any complaint shall be made concerning the ornaments of the minister in a cathedral or collegiate church, or as to the observance therein of the directions contained in the Book of Common Prayer, relating to the performance of the services, rites, and ceremonies ordered by the said book, or as to any alleged addition to, alteration of, or omission from such services, rites, and ceremonies in such cathedral or collegiate church, the person complained of shall be the clerk in holy orders alleged to have offended in the matter complained of; and the visitor or the judge, as the case may be, in the event of obedience not being rendered to a monition, shall have the same power as to inhibition, and the preferment held in such cathedral or collegiate church by the person complained of shall be subject to the same conditions as to avoidance, notice, and lapse, and as to any subsequent appointment, presentation, collation, or nomination thereto, and as to due provision being made for the performance of the duties of such person, as are contained in this Act concerning an incumbent to whom a monition has been issued, and concerning any benefice or other ecclesiastical preferment held by such incumbent.

Limitation of proceedings against incumbent.

18. When a sentence has been pronounced by consent, or any suit or proceeding has been commenced against any incumbent under the Act of the third and fourth year of the reign of Her Majesty, chapter eighty-six, he shall not be liable to proceedings under this Act in respect of the same matter; and no incumbent proceeded against under this Act shall be liable to proceedings under the said Act of the third and fourth year of the reign of Her Majesty, in respect of any matter upon which judgment has been pronounced under this Act.

Rules for settling procedure and fees under this Act.

19. Her Majesty may by Order in Council, at any time either before or after the commencement of this Act, by and with the advice of the Lord High Chancellor, the Lord Chief Justice of England, the judge to be appointed under this Act, and the archbishops and bishops who are members of Her Majesty's Privy Council, or any two of the said persons, one of them being the

Lord High Chancellor or the Lord Chief Justice of England, cause rules and orders to be made for regulating the procedure and settling the fees to be taken in proceedings under this Act, so far as the same may not be expressly regulated by this Act, and from time to time alter or amend such rules and orders. All rules and orders made in pursuance of this section shall be laid before each House of Parliament within forty days after the same are made, if parliament is then sitting, or if not, within forty days after the then next meeting of parliament; and if an address is presented to Her Majesty by either of the said Houses within the next subsequent forty years on which the House shall have sat praying that any such rules may be annulled, Her Majesty may thereupon by Order in Council annul the same, and the rules and orders so annulled shall thenceforth become void, without prejudice to the validity of any proceedings already taken under the same.

SCHEDULES referred to in the foregoing Act.

SCHEDULE (A).

I do hereby solemnly declare that I am a member of the Church of England as by law established.

Witness my hand this ——— day of ———.

SCHEDULE (B).

"PUBLIC WORSHIP REGULATION ACT, 1874."

To the Right Rev. Father in God, *A.*, by Divine permission Lord Bishop of *B.*

I, [We,] *C.D.*, Archdeacon of the archdeaconry of ———, [*or* a churchwarden *or* three parishioners of the parish of *E.*,] in your Lordship's diocese, do hereby represent that [*the person or persons complained of*] has *or* have [*state the matter to be represented; if more than one, then under separate heads*].

Dated this ——— day of ——— 18 .

(Signed) *C.D.*

The judgment of the Judicial Committee of the Privy Council in the cases of *Liddell* (clerk) and *Horne and others*, against *Westerton*, *Liddell* (clerk) *and Parke and Evans* against *Beale*, so far as the same relates to the construction of the introductory rubric of the Book of Common Prayer.

[See 5 *Weekly Reporter*, p. 471, and see Dr. *Bayford's* judgment, p. 110.]

In dealing with this question it is necessary to remember that there were many crosses, some with, some without the image of the Saviour, which were in use in the Roman Catholic ritual; altar crosses, processional crosses, funeral crosses, and others, as well as painted or carved representations of the cross not used in the services, but set up as architectural decorations of churches, and the question is whether the rubric applies to the latter class. The rubric is in these words: "And here it is to be noted that such ornaments of the church and of the ministers thereof, at all times of their ministry, shall be retained and be in use as were in this Church of England, by authority of parliament in the second year of King Edward VI. Dr. Lushington was of opinion that by the true construction of these words reference must be had to 2 & 3 Edw., 6, and the prayer book which it established, for the purpose of determining what ornaments were thereby sanctioned, but he was perplexed by the difficulty that although there were words in that prayer book describing the ornaments of the ministers, there were none which applied to ornaments of the church, in his understanding of this expression. Their lordships, after much consideration, are satisfied that the construction of this rubric, which they suggested at the hearing of the case, is its true meaning, and that the word "*ornaments*" applies, and in this rubric is confined, to those articles the use of which in the services and ministrations of the church is prescribed by the prayer book of Edward VI. The term "ornaments" in ecclesiastical law is not confined, as by modern usage, to articles of decoration or embellishment, but it is used in the larger sense of the word *ornamentum*, which, according to the interpretation of Forcellini's dictionary, is used *pro quocumque apparatu seu implemento*. All the several articles used in the performance of the services and rites of the church are ornaments. Vestments, books, cloths, chalices, and patens, are amongst such ornaments; a long list of them will be found extracted from Lyndewoode, in Dr. Phillimore's edition of *Burn's Ecclesiastical Law*. In modern times organs and bells are held to fall under this denomination. When reference is had to the first prayer book of Edward VI., with this explanation of

the term "ornaments," no difficulty will be found in discovering amongst the articles of which the use is there enjoined, ornaments of the church as well as ornaments of the ministers, besides the vestments differing in the different services, the rubric provides for the use of an English Bible, the new prayer book, a poor man's box, a chalice, a corporas, a paten, a bell, and some other things. That these articles were included in the term "ornaments of the church" at the period in question is clear, from two documents nearly contemporaneous, one before and the other after the establishment of the first prayer book. In a letter of the council to Cranmer, dated the 30th April, 1548 (to be found in *Strype's Memorials of Cranmer*, vol. 2, p. 90), they complain of the conduct of certain churchwardens who sent away their chalices, crosses of silver, bells and other ornaments of the church; and in a commission in 1552 (*Cardw. Doc. Ann.* 112), the commissioners are enjoined to leave in every church or chapel of common resort, one, two, or more chalices or cups, according to the multitude of people in every such church or chapel, and also *such other ornaments* as by their discretion shall seem requisite for divine service in every such place for the time. If reference be now made to the alterations in these matters introduced by the second prayer book of Edward VI., and the subsequent rubric to the prayer book of Elizabeth, the meaning will be sufficiently clear. The second prayer book forbids the use of different vestments by the priest in the performance of the different services, and enjoins the use of a surplice only; and does not expressly mention the paten, chalice, and corporas. After the overthrow of Protestantism by Queen Mary and its restoration on the accession of Queen Elizabeth, a great controversy arose between the more violent and the more moderate reformers as to the church service which should be re-established, whether it should be according to the first or according to the second prayer book of Edward VI. The Queen was in favour of the first, but she was obliged to give way, and a compromise was made, by which the services were to be in conformity with the second prayer book, with certain alterations, but the ornaments of the church, whether those worn or those otherwise used by the minister, were to be according to the first prayer book. In conformity with this arrangement the Act 1 Eliz. c. 2, was passed, by which the use of the second prayer book was established, but it was provided "that such ornaments of the church and of the ministers thereof shall be retained and be in use as was in this Church of England by authority of parliament in the second year of the reign of King Edward VI., until other order taken therein by the authority of the Queen's Majesty with such advice as therein mentioned." The rubric to the new prayer book, framed to express the meaning of this proviso, is in these words: "And here is to be noted that the minister, at the time of the communion, and at all other times of his ministration, shall use

such ornaments in the church as are in use by authority of parliament in the second year of the reign of King Edward VI., according to the Act of parliament set in the beginning of this book. Here, the term "ornaments" is used as covering both the vestments of the ministers and the several articles used in the services; it is confined to such things as in the performance of the services the minister was to use. It will be observed that this rubric does not adopt precisely the language of the statute, but expresses the same thing in other words. The statute says such ornaments *of* the church and of the minister "shall be retained and be in use;" the rubric, "that the minister shall use such ornaments *in* the church." The rubric to the prayer book of January 1, 1604, adopts the language of the rubric of Elizabeth. The rubric to the present prayer book adopts the language of the statute of Elizabeth; but they all obviously mean the same thing, that the same dresses, and the same utensils or articles which were used under the first prayer book of Edward VI. may still be used. None of them, therefore, can have any reference to articles not used in the services, but set up in churches as ornaments in the sense of decorations. It was urged at the bar that the present rubric, which refers to the second year of Edward VI., cannot mean ornaments mentioned in the first prayer book, because, as it is said, that Act was probably not passed, and the prayer book was certainly not in use till after the expiration of the second year of Edward VI., and that therefore the words "by authority of parliament" must mean by virtue of canons or royal injunctions having the authority of parliament made at an earlier period. There seems no reason to doubt that the Act in question received the royal assent in the second year of Edward VI. It concerned a matter of great urgency which had been long under consideration, and was the first Act of the session; it passed through one house of parliament on January 15, 1549, (N.S.), and the other on the 21st of the same month, and the second year of the reign of Edward VI. did not expire till January 28th. A missive of the council to the bishops, dated March 13, 1549 (N.S.), speaks of it as an Act passed at the parliament lately holden at Westminster, and in the Act of 5 & 6 Edw 6, c. 1, s. 5, it is expressly referred to as the Act "made in the second year of the King's Majesty's reign." Upon this point therefore no difficulty can arise. It is very true that the new prayer book could not come into use until after the expiration of that year, because time must be allowed for printing and distributing the books; but its use and the injunctions contained in it, were established by authority of parliament in the second year of Edward VI., and this is the plain meaning of the rubric. It was contended by Mr. Stephens, in a very able argument, that the canons passed in the reign of Henry VIII. had no parliamentary authority in the reign of Edward VI., for that the true meaning of the statutes relating to

that subject passed in the reign of Henry VIII. is, that they provide for the review of the existing canons by commissioners appointed by the king, and give authority to those canons only in the meantime, *i. e.*, during the continuance of the commission; that the commissioners never made any report; that the commissions determined by the death of King Henry VIII.; and that the parliamentary sanction given to the canons ended at the same time. If it were necessary to determine this point, their lordships think this argument might deserve serious consideration, although it is contrary to the general impression which has prevailed upon the subject. As, however, their lordships entertained no doubt whatever as to the meaning of the words "authority of parliament," used in the rubric, it is useless to enter further into the question.

Their lordships therefore are of opinion that although the rubric excluded all use of crosses in the services, the general question of crosses not used in the services but employed only as decorations of churches, is entirely unaffected by the rubric. If crosses of the latter description were in use in the second year of Edward VI. they derive no protection from the rubric; if they were lawfully in use they are not excluded by the rubric, though they might not have the sanction of the authority of parliament.

1825.
Hil. Term
By-day.

Report of the Case of *Fuller* v. *Lane.*

[On appeal from the Commissary of Surrey's Court.]

[Reported 2 *Addams*, p. 419.]

Faculties appropriating pews in parish churches to particular families, in different forms, and under different limitations, too lavishly granted by ordinaries in former times—the numerous exclusive rights to particular pews, vested or supposed to be vested in particular families to which this has given rise. nuisances to parishes at large—it is the duty of ordinaries to prevent as far as may be, their continuance or increase, by treating all applications for such faculties with great reserve; and by suffering none to issue but under very particular circumstances.

This was a question respecting the appropriation of a pew in a parish church by faculty; in which the law respecting the appropriation of pews by faculties, and the principles by which ordinaries should be governed in diposing of applications for the issue of such faculties, especially as with reference to the circumstances of the times, were fully entered into, and were stated by the Court at large in its judgment.

Judgment.

Sir John Nicholl:—

This is a question respecting the appropriation, by faculty, of a certain pew, in the parish church of Lingfield, in the diocese of Winchester, and county of Surrey, to Thomas Lane, the respondent in this court. Mr. Lane applied for this faculty to the Commissary of Surrey, within the limits of whose jurisdiction Lingfield is situate. Accordingly, a citation issued from the Commissary of Surrey's Court, in June, 1821, calling upon the minister, churchwardens and parishioners of the said parish of Lingfield in special, and all others having or pretending to have any right, title or interest in the premises, in general to appear and show cause why a license and faculty should not issue for confirming and appropriating the use of the said pew to Mr. Lane and his family, so long as he and they should continue parishioners and inhabitants of Lingfield—with the usual intimation.

An appearance was given to this citation, as well by the minister and churchwardens, as by a Mr. Kelsey, a parishioner of Lingfield, both as opposing the grant; and two several allegations were filed, nominally, on the part of both, but really on the part of Kelsey only; it being the purport of those allegations to set up an exclusive right to the pew sought to be appropriated to Kelsey, as appurtenant to a mansion in the parish called Batnors, which he, Kelsey, had then recently purchased. In point of fact the minister and churchwardens took no step in the cause, during its pendency in the court below, beyond that of a mere appearance to the citation; and which step they seem to have taken only as conceiving, somewhat erroneously indeed, that they were bound to appear to the citation.

Kelsey's second allegation, I should say, was responsive to a plea filed by Lane, in answer to the first; in which not merely

Kelsey's asserted prescriptive right to the pew was denied, but in which the pew was claimed as already appertaining to Lane; in virtue of his connection with the former proprietors of Batnors, even though no faculty should issue, as prayed. The question, so far, then, was a question of right between Lane and Kelsey; the minister and churchwardens neither interfering (except as already stated) nor being called upon to interfere. From the rejection, in part, of Kelsey's second allegation by the court below an appeal, as from a grievance, was prosecuted to this court, which sustained the judgment of the court below, but retained the principal cause, at the prayer of both parties. But the question here, in substance, is quite another question to that which was depending in the court below; this court having disposed at once of any legal title to the pew set up on either side, in pronouncing its judgment upon the merits of the appeal. For it clearly appeared to this court, at the hearing of the appeal, that, for reasons presently to be stated, neither of these parties had, though both were asserting it, any legal right whatever to the pew in dispute. The question here then became, and still is, not any question of right; it is merely whether the court, in the exercise of a sound discretion, shall or shall not proceed to appropriate this pew, by its license or faculty, *ex gratiâ*, to the respondent upon the grounds stated in and pursuant to the tenor of the original citation. From the instant of the question assuming this shape, namely, from the hearing of the appeal, it became the duty of the minister and churchwardens (Kelsey withdrawing from the suit) to lay before the court the facts necessary to guide its discretion upon such a question. This they have done through the medium of two allegations (the second again responsive to a plea filed by Lane, in answer to the first); and it now becomes the duty of the court to state whether, upon a review of all the facts and circumstances brought to its notice in the evidence taken upon these allegations, that it is, or is not, an application on the part of Mr. Lane proper to be acceded to.

It appears, then, by this evidence, that Mr. Antony Faringdon, in the occupation at that time of a house and estate in the parish of Lingfield called Batnors, of which he was also the proprietor, somewhere about the year 1709, made certain presents to the church; in return for which the parish conceded to him and his family the exclusive use and possession of a certain pew in the church, being the identical pew which is the subject of the present proceeding. This is verified in part by the following order of vestry, made in the year 1709, extracted from the parish books under that year:—

"Memorandum.—In the year 1709, when the parish church of Lingfield, in the county of Surrey, was new beautified; and a great many new pews added, it was agreed between the then churchwardens, parishioners, and Antony Faringdon, Esq., for and in consideration that the said Antony Faringdon, Esq., presented an

altar cloth, and Mrs. Elizabeth Faringdon, wife of the said Antony Faringdon, presented a silver salver, for the use of the communion—that, therefore, the said Antony Faringdon, Esq., should have and hold, for his own use, and the use of his family, a certain seat or pew, adjoining the pulpit stairs."

Batnors continued in the possession of the Faringdon family from 1709 to 1820, when a Mr. James Faringdon, its then proprietor, and the great grandson of Mr. Antony Faringdon, the first grantee of the pew, if he may be so called, sold the estate to Mr. Kelsey—such was the origin of Mr. Kelsey's supposed claim. Now to that of Mr. Lane—Mr. James Faringdon, it seems, has two sisters, the one unmarried; the other the wife of Mr. Lane, who, I should say, is an attorney in London. Up to 1820, the Faringdons are admitted to have had the exclusive use of the pew, in which from the time of his marriage, in 1807, Mr. Lane, of course, sat with his wife, occasionally as a visitor at Batnors; but, I presume, as a visitor only. In 1816, indeed, some repairs were done to the pew, apparently at the expense of Mr. Lane; but he (Lane), at that time, was the actual mortgagee, and was in treaty for the purchase of Batnors.

Upon the sale of Batnors to Kelsey, in 1820, the question as to the (supposed) ownership of this pew, to which I have already adverted, immediately arose. Kelsey claimed it as an appurtenant to the mansion, obviously without any legal foundation; as the facts stated, the order of vestry, &c., are conclusive against any annexation of this pew to Batnors by prescription, a title the only legal foundation of which is immemorial usage. On the other hand, Mr. James Faringdon maintained, upon equally untenable grounds, that the pew was still absolutely and exclusively his, claiming it as the immediate descendant and representative of Mr. Antony Faringdon, the first donee; in which capacity, and not as the mere owner of Batnors, he insisted that the right had long vested in him. Accordingly, he both claimed to occupy the pew exclusively, during his continuance, for about nine months, in the parish, after leaving Batnors; and upon finally quitting it affected to convey or assign his interest in the pew to his brother-in-law, Mr. Lane, he (Lane) having purchased twelve or fifteen acres in the parish, upon which he had begun to build a house at that time, which has since been finished, and which he now inhabits. Such was the origin of Mr. Lane's asserted title, persisted in (like that of Kelsey) up to the hearing of the appeal; as, also indeed, that the pew was his, in right of his wife, in virtue of her descent from Mr. Antony Faringdon, independent of any conveyance or assignment from his brother-in-law, Mr. James Faringdon; for this also was set up, in the allegation filed on his part in the Commissary of Surrey's Court. I need scarcely say that, upon this showing, Lane has no right to the pew any more than Kelsey. The last person who had a vested right to the pew, of any description, was Mr. James Faringdon, but even his right was a mere

possessory right; as such it was liable to defeazance by the ordinary, and by the churchwardens as officers of the ordinary, even during his continuance in the parish. It ceased and determined, *ipso facto*, upon his ceasing to be a parishioner, when the pew reverted to the parish at large, and became as liable as any other pew in the church to the disposal of the ordinary, and of the churchwardens again, in the first instance, still as officers of the ordinary. However, Mr. Lane and Mr. Kelsey mutually assert their right to the pew, from the time of Mr. James Faringdon quitting the parish, in January 1821, but without any legal step taken, till the month of June in that year, when Mr. Lane applies to the ordinary (the Commissary of Surrey) for a faculty, appropriating to him (or rather confirmatory to his alleged title the pew in question. The subsequent proceedings, both in the court below and in this court, and the true state of the question here, have already been stated. It only remains to add, that Mr. Lane still insists that the faculty prayed should issue *ex gratiâ*, though he no longer claims it *ex debite justitiæ*, as partly, at least, in the first instance; submitting also, that it may issue, as prayed, without any prejudice to the parish. The minister and churchwardens deny this, maintaining that a grant of the faculty prayed (of the validity of Mr. Lane's pretensions to which they leave the court to dispose) would be manifestly inconvenient, with reference to the increasing population of Lingfield, and even to the present want of accommodation for those who are authorized and disposed to attend divine service at its parish church. Such have been the several proceedings up to the present time; such are the cases severally undertaken to be made; and such is the whole question of which the court has now finally to dispose.

The general law with respect to pews and sittings in churches is little understood; erroneous notions on this subject are current, at least, in many parts of the country, and have led to much practical inconvenience. It is necessary that the court should briefly advert to these topics, in order to dispose intelligibly to the parties of the question at issue.

By the general law, and of common right, all the pews in the parish church are the common property of the parish; they are for the use, in common, of the parishioners, who are all entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens, as the officers, and subject to the control of the ordinary. Nither the minister nor the vestry have any right whatever to interfere with the churchwardens, in seating and arranging the parishioners, as often erroneously supposed; at the same time the advice of the minister, and even sometimes the opinions and wishes of the vestry, may be fitly invoked by the churchwardens, and, to a certain extent, may be reasonably referred to in this matter.

The general duty of the churchwardens is to look to the general accommodation of the parish, consulting as far as may be, that of all its inhabitants. The parishioners, indeed, have a claim to be seated according to their rank and station; but the churchwardens are not, in providing for this, to overlook the claims of all the parishioners to be seated, if sittings can be afforded them. Accordingly they are bound, in particular, not to accommodate the higher class beyond their real wants, to the exclusion of their poorer neighbours, who are equally entitled to accommodation with the rest, though they are not entitled to equal accommodation, supposing the seats to be not all equally convenient.

Such, then, are the general duties of churchwardens, in seating and arranging the parishioners in their several parish churches; but the actual exercise of their office, in this particular, is too frequently interfered with by faculties, appropriating certain pews to certain individuals, in different forms, and with different limitations, and by the prescriptive rights to pews of which these faculties have been the occasion. Faculties of this description have certainly been granted, in former times, with too great facility, and by no means with due consideration and foresight; the appropriation has sometimes been, to a man and his family, "so long as they continue inhabitants of a certain house in the parish." The more modern form is, to a man and his family, "so long as they continue inhabitants of the parish," generally; the first of these is, perhaps, the least exceptionable form. It is unlikely that a family continuing in the occupation of the same house in the parish, shall be in circumstances to render its occupation of the same pew in the church very objectionable. The objection which applies to the other class of faculties is, that they often entitle parishioners to the exclusive occupancy of pews, of which they themselves are no longer in circumstances to be suitable occupants at all, whatever their ancestors might have been. A third set of faculties, not unusual after churches have been new pewed, either wholly or in part, appears to have been a faculty for the appropriation of certain pews to certain messuages or farmhouses; the probable origin (the faculties themselves being lost) of most of those prescriptive rights to particular pews, recognized as such at common law, the parties claiming which must show the annexation of the pews to the messuages time out of mind, and the reparation from time to time of the particular pews, by the tenants of such houses or messuages, in order to make out their prescriptive titles. Some instances there are, of faculties at large; that is appropriating pews to persons and their families, without any condition annexed of residence in the parish. But such faculties are, so far at least, merely void, that no faculty is deemed, either here or at common law, good to the extent of entitling any person who is a non-parishioner to a seat even in the body of the church. As to an

aisle or chancel, that, indeed, may belong to a non-parishioner; for the case of an aisle, or chancel, depends upon, and is governed by other considerations. But whenever the occupant of a pew in the body of the church ceases to be a parishioner, his right to the pew, howsoever founded, and how valid soever, during his continuance in the parish, at once ceases and determines, though the contrary is very often supposed; as, for instance, that he may sell or assign it, or let it to rent, as part and parcel of his property in the parish. So, again, of pews annexed by prescription to certain messuages, it is often erroneously conceived, that the right to the pew may be severed from the occupancy of the messuage: it is no such thing—it cannot be severed; it passes with the messuage, the tenant of which for the time being has also *de jure*, for the time being, the prescriptive right to the pew. The result, upon the whole, however, of these faculties is, that, in many churches, the parishioners at large are deprived, in a great degree, of suitable accommodation by means of exclusive rights to pews, either actually vested in particular families, by faculty or prescriptions, or, at least, and which is the same thing as to any practical result, supposed to be so vested. I add this last, because, in very many instances, these exclusive rights are merely suppositions; and would turn out, upon investigation, to be no right at all. In this very case, for instance, there are two claims, as of rights set up to this identical pew, neither of which, it now seems, is legally valid; I mean Kelsey's asserted prescriptive right, and that of Mr. Lane, derived through the Faringdons, whose right itself was a mere possessory right that actually ceased and determined upon Mr. James Faringdon ceasing to be a parishioner, in 1821.

With the experience of the mischief that has resulted from a too lavish grant of these faculties in former times, it is the duty of the ordinary to prevent its recurrence, by proceeding in this whole matter with the utmost prudence and circumspection. It is especially, this (*a*), incumbent upon every ordinary looking to the times, with which he is bound to keep pace in all matters appertaining to his jurisdiction, so far as the same is compatible with his positive duties. Faculties of this sort might issue a century or two ago, without much, or without any impropriety, the issue of which, at the present day, would be in the highest degree improper. The population of the country, throughout has immensely increased of late, and is still increasing. Dissent from the Church, too, especially among the lower classes, has also increased—and partly, no doubt, from the lower classes being indifferently accommodated with church-room, and even being precluded, in many instances, from attending divine service in their parish churches at all. It is to remedy this want of

(*a*) So in the original.

church-room, which is much felt generally, that parliament has granted the vast sum of a million and a half, expressly for building new churches. By aid of this parliamentary fund, ninety-eight churches have already been built; accommodation has already been provided for 150,000 persons, and the present applicants for similar accommodation, by means of similar aid, are probably as many more. Large funds have also been raised, in the way of voluntary contribution, by a society for enlarging churches; 370 parishes have been assisted accordingly, at the expense of 80,000*l.*; and 110,000 additional sittings in churches have actually been provided. The funds, too, of that society are failing, though new calls upon them are still being made. In the actual expenditure of the funds to which I have just alluded, attention has been paid, in both instances, to the accommodation of the poor, no less than to that of the higher and middle orders of society. In the new churches, to be built by aid of the parliamentary funds, a fifth, at least, of the room was positively to consists of free sittings for the poor, by an express provision of the legislature; practically and in fact, a third of the room, taking the new churches throughout, has consisted of free sittings. Of the additional sittings, again, to be provided by aid of the church-enlarging society, it was a condition expressed that one-half should be free sittings. But here, again, practically and in fact, the proportion of free sitting to the other has still been greater; for, of the 110,000 sittings actually provided, 80,000 are free sittings; about three-fourths of the whole. These are strong features of the times in this particular, of the want of church-room generally, and of the propriety of affording additional church-room, especially to the poor; and they are not to be overlooked by ordinaries, when applied to on occasions like the present, for obvious reasons. With respect to the poor, indeed, every possible reason exists why no concessions should be made at all likely to infringe upon the due accommodation of the poor, in their several parish churches. It is to be presumed, that they are the persons most in want of religious instruction; and their title, as such, in particular, to receive it, is expressly recognized by the Divine Founder of Christianity himself. If disabled from receiving it, by want of room in their parish churches, they are almost driven to seek it in places of dissenting worship—a circumstance exceedingly to be deplored; although they are clearly entitled, and should be freely allowed to resort to such places of worship, if they prefer it; provided, that is, they are really dissenters in opinion from the doctrine or discipline of the church.

Following then the times, and taking all these circumstances into due consideration, a strong case should be made out to induce the ordinary, in the exercise of a sound discretion, to appropriate any pew, by faculty, to a particular parishioner and his family, at the present day. True it may be that, at the parti-

cular time when the faculty is applied for its issue may not be generally inconvenient; the parishioners at large may be sufficiently accommodated after, and notwithstanding its issue. But in this even the most favourable case, there are obvious reasons for inducing the ordinary to entertain such applications with a good deal of reserve. For instance, additional room may be soon, or at some time wanted, suggesting the propriety of new arrangements in the church; but such future arrangements may be formidably obstructed by the actual issue of the faculty then prayed; being, as it is, if once issued, good and valid, even against the ordinary himself. This consideration alone might well induce the ordinary to pause when applied to for a faculty of this nature, though no *present* inconvenience should seem to result from its concession to the applicant.

What, then, in the first place, is the case set up by Mr. Lane, to induce the ordinary to grant him, *ex gratiâ*, the permanent and exclusive possession of this particular pew? I say *ex gratiâ*, for as to any claim of right, *that* he has abandoned. It appears to me by no means a strong case: it is founded merely upon his connection by marriage, with a family, one of the members of which, more than a century ago, presented the parish with a pulpit cloth and a silver salver, said (the latter) to be still in use. But in return for this, in itself no very splendid benefaction, the head and representative of that family has had the *exclusive* use and possession of this pew, perhaps the best in the church, for more than a century, until the sale of the Batnors, the family mansion, in 1820. The parish account of the family, on the score of that benefaction, seems to me to be fairly balanced. Mrs. Lane's claims as a descendant of the original donee of the pew, are of the very weakest description. She married and quitted Lingfield in 1807; and she was domiciled with her husband in London, having no connection whatever with Lingfield except as an occasional visitor at Batnors for fifteen years. At the expiration of that time Lane becomes a parishioner; but he is a new settler, a *novus homo*, to all intents, in the parish: it is extremely doubtful even whether he *was* a parishioner at the time when the citation issued which is the foundation of this whole proceeding; he is the tenant of a house scarcely begun to be built at that time; he is entitled, most undoubtedly, to *suitable* church room for himself and his family, to the *best* which the circumstances of the parish will afford him, without prejudice to other parishioners. But as reasons for inducing the ordinary to allot him *ex gratiâ* the exclusive and permanent possession of this particular pew by faculty the case set up on his part would, under any circumstances of the parish, be, in my judgment, extremely feeble.

But how, secondly, is the parish circumstanced in this particular? What, I mean, is the population of the parish in proportion to the number of sittings in the church? and is it an

increasing or a diminishing population? These are necessary inquiries previous to *any* grant of faculty of this description; but they are most necessary, and the result should be most satisfactory in favour of *such* an applicant, to ensure the success of his application. The size of the pew too, and the proportion of the number of sittings in the pew to that of the applicant's family, are *also* to be taken into account. It remains to state the result of the evidence on these several particulars, which I think decisive against the application.

In the first place, then, this pew is one of the largest in the whole church, in point of capacity; it appears, I think, that there are only three pews in the church as large, and that there are none larger. It is capable of holding ten or twelve persons, according to Lane's own witnesses, and twelve or fourteen according to several witnesses examined on the part of the parish. Mr. Lane's family, however, consists of six persons only, including a Miss Faringdon, the wife's sister, and said, at present, to be domiciled with Mr. Lane.

Next, as to the capacity of the church to accommodate all the parishioners: the parish church of Lingfield appears to be an old collegiate church, with three chancels, as they are called, or more properly aisles; the number of pews in these aisles is twenty-three, but the aisles themselves, and the pews in them, are the mere private property of three several parishioners, who keep them in repair; and the sittings in these aisles are not open, in any sense, to the *general* accommodation of the parishioners. The number of pews in the church is sixty-six, capable of containing, according to the evidence, from six to eight persons each on an average. But the population of Lingfield is fixed at 1,770, and the number of families at 325, by authentic documents. Consequently, there are nearly five times as many families as there are pews in the body of the church; and the pews in the body of the church (the only part of it in question), to contain the whole population, should be capable of holding twenty-seven instead of seven persons each. Hence, though sittings in the church may not be necessary for the whole population; and though it may not be necessary, again, that each family should have a separate pew, yet still the result is, that there can be no superabundance of church room, which Mr. Lane undertook to show, but in which, in my judgment, he has failed. The same inference results from the present arrangement of the church, as I collect it from the evidence. Every part of the body of the church is filled with pews; nor do I understand that there is any accommodation for the lower classes out of the pews, but certain benches in the aisle, appropriated, in part at least, to a Sunday school. This is a large agricultural parish; the labourers, however (many, perhaps, aged and infirm), should seem to have no free seats with backs, to which they can resort with convenience to attend divine worship in the church. It also appears that

several heads of families (respectable farmers) sit together in one pew; their wives and families (in one instance to the number of seven) in another separate pew. This, again, suggests that the parish is driven to shifts for want of church room. It is a matter of feeling with many to perform their religious duties by the sides of their wives and families; it is a matter of practical benefit, so far as may be, to indulge this feeling. Parents in that case are more attentive, as setting an example to their children, who are likely to be, and undoubtedly, in many instances are, benefited by their example. As a matter, therefore, both of feeling and practical advantage, families should be seated together in church where this can be done; and its not being done in this instance suggests, like all the rest, that this parish church of Lingfield is even, at present, equal to the fair general accommodation of the parishioners.

But a subject of inquiry, not unimportant, still remains. Is the population of this particular parish an increasing or a diminishing population? for this is obviously a material consideration. Now, upon this head the court is left in no doubt. It appears by the evidence of Sir Thomas Furton, an old parishioner, and Mr. Lane's own witnesses, that, in about thirty years the population of Lingfield had nearly doubled itself; increasing in that time from 900 to 1,700 persons. It is still, too, a rapidly increasing population, as results both from the evidence and from the strong probability of the thing. I allude as well to the easy distance of Lingfield from the metropolis, as to the several villas, &c., said to have been recently built, and to be now building, in the parish. The very situation, indeed, of Lingfield, independent of any evidence, renders it utterly improbable that whilst the population of the country throughout is, as it is, on the increase, that of this particular place, of all others, should be on the decline.

Upon the whole, then, I am of opinion, for the reasons stated, that the present is by no means an application which the ordinary would be justified in acceding to, taking into consideration the merits (so to call them) of the applicant, and the circumstances of this parish, in the particulars to which I have just been adverting. And this I do without at all meaning to say that no possible case may arise in which a faculty of this description might be issued with great propriety even in these times. For instance, a parishioner might well, possibly, entitle himself to such a faculty by contributing liberally to the enlargement, or even the new pewing of his parish church, in order to furnish additional accommodation for his fellow parishioners, and especially free seats for the poor; a matter this which may soon be called for in this particular parish of Lingfield, and would perhaps be very proper even now, upon some considerations which have already been stated. A benefactor of this description might have strong claims to a faculty of the kind now prayed. But even the claims of such

benefactors should be duly weighed by ordinaries, and the indulgence sought by them should be fettered with all due restrictions and limitations. For instance, in allotting them by faculty good or even the best sittings, ordinaries should be careful at the same time not to afford them a too great proportion of room, or one exceeding their real (actual and probable) wants, to the exclusion of other parishioners; for that would be justifiable under no circumstances. In short, I repeat, that it is the ordinary's duty, keeping pace with the times, to proceed in this whole matter, at the present day, with the utmost care and circumspection.

In respect to costs, of which something was said in the argument, the court is disposed to make no order upon costs in favour of either party. Of the original litigants, both were in error. From the time, indeed, of the appeal heard, when the court intimated its opinion that Mr. Lane had little chance of obtaining a faculty, but in the event of the circumstances of this parish being just the reverse of what they appear to the court to be, on the evidence, I think that Mr. Lane should have desisted from his application. From that time, too, it became the duty of the minister and churchwardens, the parties cited specially, and particularly of the latter, *ex officio*, to put the court in possession of those facts and circumstances necessary to guide its discretion in the premises, and upon which it has just decided that this application is not of a nature to be acceded to. But in the hope of promoting conciliation, and with a view to give a triumph to neither party, I am not disposed to accompany the refusal of a faculty in this instance with any degree against Mr. Lane for costs. As to the costs of the opposition, those I am clearly of opinion should be borne by the parish from the time of the hearing of the appeal. Up to that time the opposition proceeded upon the ground of a particular parishioner's (Kelsey's) asserted right to the pew, a question in which the parish had no concern whatever. I must presume it to have been matter of indifference to the parish to which of these parties, if to either, this pew of right exclusively belonged. Up to that time the parish, then, may reasonably decline, and leave the costs of the opposition to be defrayed by Kelsey alone.

The churchwardens may possibly wish to know what the court would recommend to be done, on their part, with respect to this pew, now ascertained to be at their disposal. Certainly not to seat either Lane or Kelsey exclusively in the pew. Their claims to be seated in it, perhaps, are pretty equal. Lane, from his marriage into the Faringdon family, may have contracted a something of attachment to the pew, not improper to be gratified to a certain extent, and within reasonable limitations. Kelsey, on the other hand, as the now proprietor of Batnors, the owners of which for the time being have exclusively occupied this pew for more than a century, may have just reason to complain (at least probably in his own opinion and that of many of his fellow

parishioners) if actually and altogether dispossessed of it. Not that there are not certain grounds of expediency which would excuse or even justify the churchwardens in declining to seat either of these parties in this particular pew. There are doubtless, parishioners whose claims to be seated in it are superior to those of Mr. Lane—a new settler,—abstract from his connection with the Faringdons, which has nothing to do with his being seated in this pew, *de jure* at least. And with respect to Kelsey: generally speaking, most undoubtedly, churchwardens act more correctly in allotting vacant pews to such parishioners as have the best claim to them in point of standing in the parish and general respectability, rather than to those who happen to succeed as tenants of the houses inhabited by the late occupiers of those pews. The occupancy of pews being thus altered from time to time according to circumstances, is the best provision against the birth or growth of those prescriptive rights of pews, as in certain families, or annexed to certain messuages, the existence of which I have said is so injurious to the general interests of the parishioners. But the present proceedings may have rendered this unnecessary as a measure of precaution in the present instance. Supposing it not to be, and that no good objection applies to the proceedings now about to be recommended, I see no reason why the present churchwardens should decline allotting this pew to Mr. Lane and Mr. Kelsey, jointly or in common. It is sufficiently roomy, according to all the evidence, to accommodate both families. But should the parties in question, unfortunately be on such a footing as to render their common occupancy of one and the same pew grating to the feelings of both or either, it may not, perhaps, under the circumstances, be quite improper that the churchwardens should convert this into two pews. Each of such pews would be capable of holding five or six persons; Mr. Kelsey might be seated in one of these pews, and Mr. Lane in the other. To this it should seem that there could be no reasonable objection, although of the exact state of the parish in all its details, the court is not in possession of sufficient information to be enabled to form a very decided opinion on this part of the case. It can only, therefore, in conclusion, recommend the churchwardens generally to act impartially in the premises between these and all parties, subject to the principles just laid down. In the performance of this part of their duty they will be assisted by the advice, though they are not governed by the authority of the minister.

The 30th Canon of 1604, *intituled* "THE LAWFUL USE OF THE CROSS IN BAPTISM EXPLAINED."

We are sorry that His Majesty's most princely care and pains taken in the conference at Hampton Court, amongst many other points, touching this one of the cross in baptism, hath taken no better effect with many, but that still the use of it in baptism is so greatly stuck at and impugned, For the further declaration, therefore, of the true use of this ceremony, and for the removing of all such scruple as might any ways trouble the consciences of them who are indeed rightly religious, following the royal steps of our most worthy King, because he therein followeth the *rules of the Scriptures and the practice of the Primitive Church;* we do commend to all the true members of the Church of England, these our directions and observations ensuing.

First, it is to be observed, that although the Jews and Ethnicks derided both the apostles and the rest of the Christians for preaching and believing in Him who was crucified upon the cross, yet all, both apostles and Christians, were so far from being discouraged from their profession by the ignominy of the cross, as they rather rejoiced and triumphed in it. Yea, the Holy Ghost, by the mouths of the apostles, did honour the name of the cross (being hateful among the Jews) so far, that under it He comprehended not only Christ crucified, but the force, effects, and merits of His death and passion, with all the comforts, fruits, and promises which we receive or expect thereby.

Secondly, the honour and dignity of the name of the cross begat a reverend estimation, even in the apostles' times (for aught that is known to the contrary), of the sign of the cross, which the Christians shortly after used in all their actions, thereby making an outward show and profession, even to the astonishment of the Jews, that they were not ashamed to acknowledge Him for their Lord and Saviour, who died for them upon the cross. And this sign they did not only use themselves with a kind of glory, when they met with any Jews; but signed therewith their children when they were christened, to dedicate them by that badge to His service, *whose benefits bestowed upon them* IN *baptism the name of the cross did represent.* And this use of the sign of the cross in baptism was held in the primitive Church, as well by the Greeks as the Latins, with one consent and great applause. At which time, if any had opposed themselves against it, they would certainly have been censured as enemies of the name of the cross, and consequently of Christ's merits, the sign whereof they could no better endure. This continual and general use of the sign of the cross is evident by many testimonials of the ancient fathers.

Thirdly, it must be confessed, that in process of time the sign of the cross was greatly abused in the Church of Rome, especially

after that corruption of Popery had once possessed it. But the abuse of a thing doth not take away the lawful use of it. Nay, so far was it from the purpose of the Church of England to forsake and reject the Churches of Italy, France, Spain, Germany, or any such like Churches, in all things which they held and practised, that as the apology of the Church of England confesseth, it doth with reverence retain those ceremonies which do neither endamage the Church of God nor offend the minds of sober men; and only departed from them in those particular points, wherein they were fallen both from themselves in their ancient integrity, and from the apostolical Churches which were their first founders. In which respect, amongst some other very ancient ceremonies, the sign of the cross in baptism hath been retained in this Church, both by the judgment and practice of those reverend fathers and great divines in the days of King Edward the Sixth of whom some constantly suffered for the profession of the truth; and others being exiled in the time of Queen Mary, did, after their return in the beginning of the reign of our late dread Sovereign, continually defend and use the same. This resolution and practice of our Church hath been allowed and approved by the censure upon the communion book in King Edward the Sixth his days, and by the harmony of confessions of latter years; because, indeed, the use of this sign in baptism was ever accompanied here with such sufficient cautions and exceptions against all Popish superstition and error, as in the like cases are either fit or convenient.

First, the Church of England, since the abolishing of Popery, hath ever held and taught, and so doth hold and teach still, that the sign of the cross used in baptism, is no part of the substance of that sacrament. For when the minister dipping the infant in water, or laying water upon the face of it (as the manner also is), hath pronounced these words: I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost," the infant is fully and perfectly baptized, so as the sign of the cross, being afterwads used, doth neither add anything to the *virtue and perfection of baptism*, nor, being omitted, doth detract anything from the *effect and substance of it*.

Secondly, it is apparent in the communion book, that the infant baptized is, *by virtue of baptism*, before it be signed with the sign of the cross, received into the congregation of Christ's flock *as a perfect member thereof*, and not by any *power* ascribed unto the sign of the cross, so that for the very remembrance of the cross, which is very precious to all them that rightly believe in Jesus Christ, and in the other respects mentioned, the Church of England hath retained still the sign of it in baptism following therein the primitive and apostolical Churches, and accounting it a lawful outward ceremony and honourable badge whereby the infant is dedicated to the service of Him that died upon the cross, as by the words used in the Book of Common Prayer it may appear.

Lastly, the use of the sign of the cross in baptism being thus purged from all Popish superstition and error, and reduced in the Church of England to the primary institution of it, upon those true rules of doctrine concerning things indifferent which are consonant to the word of God, and the judgment of all the ancient fathers, we hold the part of every private man, both minister and other, reverently to retain the true use of it prescribed by public authority, considering that things of themselves indifferent do in some sort alter their natures when they are either commanded or forbidden by a lawful magistrate, and may not be omitted at every man's pleasure contrary to the law when they be commanded, nor used when the are prohibited.

Extracts from the Homily *Of the Salvation of Mankind, by only Christ our Saviour, from sin and death everlasting*, being the third Homily of the First Book of Homilies.

From the First Part of the said Homily.

Because all men be sinners, and offenders against God, and breakers of His law and commandments, therefore can no man by his own acts, works, and deeds (seem they never so good), be justified and made righteous before God; but every man of necessity is constrained to seek for another righteousness or justification to be received at God's own hands, that is to say, the forgiveness of his sins and trespasses, in such things as he hath offended. And this justification or righteousness which we so receive of God's mercy and Christ's merits, embraced by faith, is taken, accepted, and allowed of God, for our perfect and full justification. For the more full understanding hereof, it is our parts and duties ever to remember the great mercy of God, how that (all the world being wrapped in sin by breaking of the law) God sent His only Son, our Saviour Christ, into this world to fulfil the law for us, and by shedding of His most precious blood, to make a sacrifice and satisfaction, or (as it may be called) amends to His Father for our sins, to assuage His wrath and indignation conceived against us for the same. Insomuch, that infants, *being baptized and dying in their infancy*, are by this sacrifice washed from their sins, brought to God's favour, and made His children, and inheritors of His kingdom of heaven. And they which, in act or deed, do sin *after their baptism*, when they turn again to God unfeignedly, they are likewise washed by this sacrifice from their sins, in such sort, that there remaineth not any spot of sin that shall be imputed to their damnation.

From the Second part of the said Homily.

First, you shall understand that in our justification by Christ it is not all one thing, the office of God unto men, and the office of man unto God. Justification is not the office of man, but of God, for man cannot make himself righteous by his own works, neither in part nor in the whole: for that were the greatest arrogance and presumption of man, that Antichrist could set up against God, to affirm, that a man might by his own works take away and purge his own sins, and so justify himself. But justification is the office of God only, and is not a thing which we render unto Him, but which we receive of Him; not which we give to Him but which we take of Him, by His free mercy, and, by the only merits of His most dearly beloved Son, our only Redeemer, Saviour, and Justifier, Jesus Christ: so that the true understanding of this doctrine, we be justified freely by faith without works, or that we be justified by faith in Christ only, is not, that this our own act to believe in Christ, or this our faith in Christ, which is within us, doth justify us, and deserve our justification unto us (for that were to count ourselves to be justified by some act or virtue that is within ourselves); but the true understanding and meaning thereof is, that although we hear God's word, and believe it; although we have faith, hope, charity, repentance, dread, and fear of God within us, and do never so many works thereunto; yet we must renounce the merit of all our said virtues, of faith, hope, charity, and all other virtues and good deeds, which we either have done, shall do, or can do, as things that be far too weak and insufficient, and unperfect, to deserve remission of our sins, and our justification; and therefore we must trust only in God's mercy, and that sacrifice which our High Priest and Saviour Christ Jesus, the Son of God, once offered for us upon the cross, to obtain thereby God's grace, and remission, *as well of our original sin* IN *baptism,* as of all actual sin committed by us *after our baptism,* if we truly repent and turn unfeignedly to Him again.

ARTICLES OF INQUIRY.

Articles of inquiry delivered to the churchwardens and chapelwardens of every parish within the Archdeaconry of ——, *at the visitation of the Venerable and Reverend* ——, *A. M., Archdeacon of* ——, *in the year* 18—.

N.B.—The churchwardens are desired to return these articles at the visitations, with answer in writing to each inquiry in the blank space opposite, as their presentments, and to sign their names at the end.

CHURCHWARDENS' DECLARATION.

To be made and subscribed in pursuance of the stat. of the 5th Will. 4, c. 62.

You do solemnly and sincerely declare that you will faithfully and diligently perform the duties of the office of churchwarden within the parish of ——, for the present year, to the best of your skill and understanding; and that you will present such persons and things as to your knowledge are presentable by the laws ecclesiastical of this realm.

_____
_____

Churchwardens *elect* to sign this declaration *after* it has been administered to them on the day of visitation.

SIDESMEN'S DECLARATION.

You do solemnly and sincerely declare that you will faithfully and diligently assist your churchwarden in the discharge of his office.

_____
_____

Sidesmen to sign this declaration *after* it has been administered to them on the day of visitation.

Archdeaconry of —— . *We, the undersigned churchwardens of the parish of ——, in answer to these articles of inquiry, do, upon our solemn and sincere declaration, present as follows, viz.:—*

ARTICLES OF INQUIRY.

I.

	Presentment.
1. Who is your minister? - - - - -	
2. Does he usually serve his cure himself? - -	
3. Does he reside in the parsonage house? - -	
4. Is he of sober life and conversation? - -	
5. At what hours does he celebrate divine service?	
6. Does he read divine service properly habited, reverently, distinctly, and audibly, as prescribed by the Book of Common Prayer, without additions, diminutions, or alterations? - - -	

Presentment.

7. Is the sacrament of baptism administered, *in the church* (except in cases of necessity) *and during the time of divine service?* - - - -
8. Are those who are privately baptized, afterwards publicly received into the church? - - -
9. Is the sacrament in the Lord's Supper administered so that every parishioner may receive it thrice a year at least? - - -
10. Is timely warning given thereof? - - -
11. How often does your minister preach? - - -
12. Does he publicly instruct and examine the children in the Church Catechism? Where, and at what times? - - - - -
13. Does he publicly prepare the children for confirmation? - - - - - - -
14. Does he visit the sick regularly and diligently? -
15. Are your registers deposited in an iron chest; and where is the chest kept? - - - -
16. Are the entries duly made and transcripts sent to the bishop's registry? - - - -

II.

1. Are the body and roof, tower, and steeple, walls and battlements of your church maintained in good repair - - - - - - -
2. Are your windows well glazed and leaded, and are there casements to admit air? - - -
3. Are the floors well paved and even? - - -
4. Is the chancel in good repair? - - - -
5. Is your church dry and well aired? - - -
6. Are your pulpit and reading desk in good order?
7. Have you a large Bible, a Book of Common Prayer for the minister, and another for the clerk, entire, clean, and in good order? -
8. Have you a decent stone font for the administration of baptism, and does it stand in the accustomed place, where fonts have anciently and usually stood, at or near the west end of the church? - - - - - - -
9. Have you in your chancel a communion table, with suitable furniture? - - - -
10. What several vessels have you for the administration of the Lord's Supper, and of what materials? - - - - - - - -
11. Are your bells, bell-frames, &c., in thorough repair? - - - - - - - -
12. Are the doors of your church opened, and the

Presentment.

bells rung and tolled, a reasonable time before service? - - - - - - - -

13. Are the bells rung at any other times without the leave of the minister and one churchwarden? -
14. Is your church regularly swept, and kept free from dust and dirt? - - - - - -
15. Is your churchyard well fenced, its doors and gates in good repair, and its churchways well kept up?
16. Are any encroachments made on it? Are any cattle allowed to depasture to the injury of the churchyard and graves therein? - - -
17. Are the houses and out-houses of your incumbent in good repair? - - - - - - -
18. Have you a terrier of all lands, tenement, pensions, rate-tithes, or portions of tithes, and other dues, and customs payable to your incumbent?

III.

1. Are your churchwardens chosen every year according to the custom of your parish, and what is that custom? - - - - - -
2. Are your rates for the repair of your church regularly made, and your accounts passed in vestry?
3. Do you attend divine service regularly, and keep order in the church during its celebration? -
4. Do you prevent idle persons from abiding in the church-porch, or churchyard, during service?
5. Are there any persons in your parish known or openly suspected of any crime presentable by the ecclesiastical laws of this realm? - -
6. Are there any who profane the Lord's Day by following their worldly callings, or who keep open shops, or suffer persons to tipple in their houses on that day? - - - - - - - -
7. Is your parish clerk competent to his duties, and of honest life and conversation? - - -
8. Is psalmody duly encouraged under the direction of the minister? - - - - - - -
9. Do you provide bread and wine for the communion, at the charge of your parish? - -
10. Are there any funds left for the repairs of your church? - - - - - - - -
11. Is there, or has there been, any free school, hospital, almshouse, parochial library, or donation to charitable uses within your parish? - -
12. Do you know of any abuse in the management of these charities? - - - - -

Presentment.

13. Is the key of the church kept where the minister directs? - - - - - - - -
14. Are such repairs and improvements made, or in progress, as have been ordered, at the last general visitation? - - - - -
15. Hath any officer of the Archdeacon's court demanded or taken undue and unreasonable fees for any cause or matter transacted by him?

Signed, { _____ / _____ } *Churchwardens.*

THE TABLE OF ECCLESIASTICAL FEES AND PAYMENTS.

(So far as the same relates to the consecration of churches, chapels, and burial grounds, visitations and the Grant of Faculties), settled by the Archbishop of Canterbury, the Lord High Chancellor, and the Archbishop of York, in pursuance of the Act of 30 & 31 Vict. c. 135, intituled, "An Act for the Establishment of a Table of Fees to be taken on the Consecration of Churches, Chapels, and Burial Grounds, on the Ordinations of Deacons and Priests, and on Visitations," submitted to Her Majesty's Privy Council under the first section of the said Act, on the 15th day of March, 1869, and published in the "London Gazette" of the 19th day of that month.

	Vicar-General, Chancellor, Archdeacon, or Official.	Registrar or other Officer by usage performing the duty.	Secretary of Archbishop or Bishop.	Apparitor.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.
1. Consecration of a Church and Burial Ground	3 3 0	7 7 0	1 1 0	1 1 0
2. Consecration of Cemetery or Burial Ground	2 2 0	6 6 0	1 1 0	1 1 0
3. Episcopal or Archidiaconal Visitation	0 2 0	0 12 6	...	0 3 6
4. Faculty for Alterations in Churches or Churchyards. . .	1 1 0	3 13 6	...	0 10 6

1 and 2. The chancellor's fee includes the approval of the plans, the perusal of the petition and other papers, the settling the sentence, and the approval of the draft act. The registrar's fee includes the perusal of the deeds of conveyance, the drawing and engrossing of the petition, and the sentence and notarial act, the necessary attendance at the consecration, and the registering the deeds and the act in the register book of the diocese. The secretary's fee includes the inspection of plans and correspondence prior to the papers being sent to the registry. The apparitor's fee includes all necessary citations and attendance on the bishop at the consecration.

3. The chancellor's fee includes the attendance of the chancellor or his surrogate, the examination of the presentments of the outgoing churchwardens, and the admission of the new churchwardens to office. The registrar's fee includes the drawing and issuing of the inhibition and of the mandate for the citation of the clergy, the preparation of the visitation books and of the articles of inquiry and the presentment papers, the attendance at the visitation and attesting the presentments and declarations of the churchwardens, the registering the papers exhibited by the clergy, the tabulating in the registry the copies of the register books of baptisms and burials, and other papers required to be annually transmitted. The apparitor's fee includes the preparation and delivery of the citations to the clergy and churchwardens, and the attendance at the visitation.

4. The chancellor's fee includes the perusal of the petition, the order for the notice or citation, as the case may be, the perusal of the certificate and other papers, and making the decree. The registrar's fee includes the perusal of the minutes of vestry and the petition, the drawing of the notice or citation, and attending the chancellor for his order, the preparation of the certificate and attendance on the chancellor for his decree, and the drawing and signing the faculty. The apparitor's fee includes the service of the notice or citation, but is exclusive of 1*s.* a mile for travelling expenses, if the citation is to be personally served in the country.

(Signed) A. C. CANTUAR,
HATHERLEY, C.
W. EBOR.

THE PUBLIC WORSHIP REGULATION ACT, 1874.

THE RULES AND ORDERS OF COURT.

Representations, &c.

1. The representation, declarations, and all other documents required by the Act or by these rules and orders to be transmitted to the bishop, shall be either delivered at or sent by post in a registered packet to the registry of the diocese within the jurisdiction of which the church or burial ground, to which the representation relates, is situate. Such registry is hereinafter called "the diocesan registry," and the registrar thereof is hereinafter called "the diocesan registrar." The word "complaint" is hereinafter used to designate the person (or persons, if more than one,) making the representation.

2. All documents required by the Act or by these rules and orders to be transmitted to the archbishop or the judge shall be either delivered at or sent in manner above mentioned to the Registry of the *Arches Court* of Canterbury (when the matter arises within the province of Canterbury), or the Registry of the *Chancery Court* of York (when the matter arises within the province of York). Such registry is hereinafter called the "provincial registry," and the registrar thereof is hereinafter called the "provincial registrar."

3. All documents and notices required by these rules and orders to be transmitted to the diocesan or provincial registries may be either delivered at or sent in manner above mentioned to such registries, and all documents and notices to be issued from he said registries may be sent by post in like manner.

4. The forms of declaration and representation are printed in the Appendix, Nos. 1, 2, and 3. The declaration No. 1 in cases where such declaration is required, and in other cases the representation is to be accompanied by an address to which documents and notices for the complainant may be sent. The diocesan registrar shall acknowledge the receipt of all documents on the days on which they shall be respectively received. A form of receipt is given in the Appendix, No. 4.

5. The bishop may call attention by notice in writing to any formal defects which may appear on the face of the representation, and require the same to be amended by the complainant. A form of such notice is given in the Appendix, No. 5.

6. Within twenty-one days after the receipt of the representation, unless the bishop directs that proceedings shall not be taken on it, Form No. 6, the diocesan registrar shall transmit a copy thereof and of the declarations to the person complained of, hereinafter called the "respondent," addressed to him at the parish to which the representation relates, together with a form of receipt to be signed by the respondent and returned to the diocesan registry. The form of receipt is given in the Appendix, No. 7. If at the end of a week after the transmission of the representation the signed receipt shall not be returned to the diocesan registry, the diocesan registrar shall cause a duplicate copy of the representation to be personally served upon the respondent; or in case personal service cannot be effected, the diocesan registrar shall substitute such other mode of service as the bishop may direct. The expense of such personal or substituted service shall be borne by the respondent unless the bishop shall otherwise order.

Consent to submit to Bishop's Directions.

7. The diocesan registrar shall, concurrently with such transmission of the copy of the representation, also transmit to the complainant and respondent respectively the form of consent given in the Appendix to submit to the directions of the bishop touching the representation, together with the requisition relating thereto; and such consent is to be signed and returned into the diocesan registry within twenty-one days, if the parties desire the representation to be heard and determined by the bishop. The forms of requisition and consent are Nos. 8 and 9 in the Appendix.

Special Case for Judge's Opinion.

8. At any time after the return of such consents, and before the expiration of the said twenty-one days, a special case, signed by the parties and a barrister-at-law, for the opinion of the judge, may be transmitted to the bishop. Such case is to contain a succinct statement of facts followed by a distinct statement of the questions submitted for the opinion of the judge. A form of special case is given in the Appendix, No. 10.

9. The special case shall be forthwith transmitted, Form No. 11, by the diocesan registrar to the judge, who shall be at liberty to require the same to be amended, and to order the transmission to

the provincial registry of the representation, and all documents relating thereto.

10. The provincial registrar shall give notice in writing to the parties of the time and place appointed by the judge for the hearing of the special case; and on the determination thereof the provincial registrar shall transmit to the diocesan registrar the determination of the judge, together with the representation and other documents in his possession.

Transmission to Archbishop of Representation in Case of non-submission to Bishop.

11. If the parties, or either of them, shall fail to return to the diocesan registry the consent, duly signed, to submit to the bishop's directions, within twenty-one days after the same shall have been sent to them as aforesaid, the diocesan registrar shall forthwith transmit the representation to the archbishop, who shall thereupon require the judge to hear the same. The forms of such transmission and requisition are given in the Appendix, Nos. 12 and 13.

Security for Respondent's Costs.

12. The complainant shall deposit in the provincial registry such a sum of money as the judge, upon the report of the provincial registrar, shall order, or a bond with two sureties for the like sum, as security for the costs of the respondent, together with an affidavit of justification by the sureties. A form of bond and of affidavit of justification is given in the Appendix, Nos. 14 and 15.

13. The judge shall be at liberty, upon the application of the respondent, after the answer and reply (if any) shall have been transmitted, to order further security to be given in manner above set forth, to such an amount as he shall think proper.

14. For the purpose of fixing the amount of such further security the parties must attend the provincial registrar upon summons to be taken out by the respondent, and the provincial registrar shall report to the judge.

Notice of hearing before a Judge.

15. After security shall have been given the provincial registrar shall forthwith give notice to the parties of the time and place appointed by the judge for hearing the said representation; such notice not to be less than twenty-eight days.

ANSWER TO REPRESENTATION, &c.

16. The answer (if any) of the respondent shall be delivered at or transmitted to the provincial registry within twenty-one days of the date of such notice, and be accompanied by an address to which documents and notices for him may be sent.

17. It shall not be lawful for the complainant, except with the leave of the judge, to reply to such answer. Such reply, if allowed, is to be delivered at or transmitted to the provincial registry within such time as the judge may direct.

18. Either party shall be at liberty to apply to the judge or the provincial registrar for an order upon the other party to amend the representation, answer, or other statement respectively, or for liberty to correct errors in their own statements. A form of answer and reply is given in the Appendix, Nos. 16 and 17.

EVIDENCE AT THE HEARING.

19. A form of agreement is given in the Appendix, No. 18, to be signed by all parties, and delivered at or transmitted to the provincial registry before the hearing, in case they desire that the evidence shall be taken down by a shorthand writer, and that the shorthand writer's notes, duly certified by him, shall be used on appeal, and that a special case shall not be stated.

COPY OF JUDGMENT. &C., TO BE TRANSMITTED TO BISHOP.

20. The provincial registrar shall transmit to the diocesan registry an official copy of the judgment and of the special case (if any), and the fees payable in respect of such copies shall be paid by the complainant in the first instance, but shall be costs in the cause. The fees payable in respect of any such copies applied for by the parties shall be paid by them respectively on making application.

ATTENDANCE OF REGISTRAR AT HEARING.

21. At every hearing before the judge, whether of the representation or of any incidental matter, and whether in court or chambers, the judge shall be attended by the provincial registrar if sitting in London, or Westminster, or at York, or the diocesan registrar if sitting elsewhere. Such diocesan registrar shall transmit to the provincial registrar the minutes of the proceedings at the hearing to be recorded by him. The judge, when sitting in London or Westminster, shall be at liberty to substitute the registrar of the *Arches Court* of Canterbury for the registrar of the *Chancery Court* of York, although the matter may have arisen within the province of York, but such registrar

shall transmit to the provincial registry at York the minutes of the proceedings to be recorded therein. The registrars shall, in addition to the other duties hereby required of them, file and preserve all documents received at their respective registries, other than those which they are required to transmit elsewhere. The bishop shall, in like manner, be attended by the diocesan registrar, who shall be charged with like duties in all proceedings before the bishop.

Monition.

22. A monition, if ordered by a bishop or the judge, shall be issued from the diocesan or provincial registry (as the case may be), upon the application of the complainant and the delivery of a præcipe for the same. Forms of monition and præcipe are given in the Appendix, Nos. 19 and 20.

Appeal.

23. A party desirous of appealing from a judgment or monition shall deliver into the provincial registry a notice of appeal within fifteen days of the service of the monition, in a case where a monition is issued, and in any other case within fifteen days of the date of the judgment; and thereupon the certified notice of evidence, or the special case settled by the judge (as the case may be), shall be transmitted by the provincial registrar with the other documents to the appeal registry in manner required by the Court of Appeal. A form of notice of appeal is given in the Appendix, No. 21.

Suspension, Pending Appeal, of the Execution of a Monition.

24. A respondent shall be at liberty at any time after notice of appeal shall have been given to apply for a summons against the complainant to show cause why the execution of a monition should not be suspended pending the appeal. At the hearing of such summons the judge will require such evidence and make such order as he shall think fit.

25. A suspension, if ordered by the judge, shall be issued from the provincial registry upon the application of the respondent, and the delivery of a præcipe for the same. Forms of suspension and præcipe are given in the Appendix, Nos. 22 and 23.

Enforcing Obedience.

26. It shall be competent for the complainant, at any time after the service of a monition, to apply for a summons against the respondent to show cause why an inhibition should not issue to enforce obedience to the monition. Such applica-

tion shall be supported by the report of the bishop, Form No. 24 in the Appendix, in case of disobedience to a bishop's monition, or an affidavit in case of disobedience to the judge's monition. At the hearing of such summons the judge will require such further evidence as he shall think fit.

27. An inhibition, if ordered by the judge, shall be issued from the provincial registry upon the application of the complainant, and the delivery of a præcipe for the same. Forms of inhibition and præcipe are given in the Appendix, Nos. 25 and 26.

28. At the expiry of the term named in the inhibition it shall be competent for the respondent, on delivering an undertaking to obey the monition, Form No. 27 in the Appendix, to apply for a summons against the complainant, to show cause why a relaxation should not issue, and, if ordered by the judge, the relaxation shall be issued from the provincial registry, upon the application of the respondent, and the delivery of a præcipe for the same. Forms of relaxation and præcipe are given in the Appendix, Nos. 28 and 29.

29. A monition, inhibition, and relaxation, when signed by the provincial or diocesan registrar (as the case may be) shall be effectual without further attestation.

30. Every monition and inhibition shall be personally served, except in cases where personal service cannot be effected, when such other mode of service shall be substituted as the judge or registrar may direct. Such instruments shall be returnable into the provincial or diocesan registry (as the case may be) within a week of such service respectively.

31. A copy of every inhibition to enforce obedience to a bishop's monition shall be transmitted to the bishop by the provincial registrar.

Enforcing Obedience of Dean and Chapter.

32. In the event of obedience not being rendered to any monition relating to the fabric, ornaments, furniture, or decorations of a cathedral or collegiate church, a precept, if ordered by the judge, shall be issued from the provincial registry upon the application of the complainant, and the delivery of a præcipe for the same, authorizing the registrar or other person or persons named by the judge to carry into effect the directions contained in the said monition. Forms of such precept, and præcipe, and of sequestration of the profits of the preferments held in such cathedral or collegiate church by the dean and chapter thereof, are given in the Appendix, Nos. 30, 31, and 32.

Subpœnas.

33. A subpœna may include the names of any number of witnesses. The party shall take it, together with a præcipe, to the provincial registry, where it shall be signed, and the præcipe deposited. Forms are given in the Appendix, Nos. 33, 34, 35, and 36.

Admission of Documents.

34. Either party may call upon the other, by notice in writing, to admit any document, saving just exceptions, and in case of refusal or neglect to admit the same, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the hearing the judge shall certify that the refusal was reasonable; and no costs of proving any document shall be allowed as costs in the cause, except in cases where the omission to give the notice was in the opinion of the registrar a saving of expense. A form of notice to admit is given in the Appendix, No. 37.

Notices.

35. All notices required by these rules and orders shall be in writing, and signed by the party.

Service of Notices, &c.

36. It shall be sufficient to transmit all notices and other documents intended for the complainant to the address furnished by him as aforesaid, and to address all notices and other documents intended for the respondent to the parish to which the representation relates, unless and until the respondent shall furnish to the diocesan registry or the provincial registry (as the case may be) another address to which documents may be sent, from which time all such notices and other documents shall be sent to such other address.

Appearance by Proctor or Solicitor.

37. Whenever an appearance is entered by a proctor or solicitor for a complainant or respondent, all notices and other documents required by these rules and orders to be transmitted to or by the parties shall in lieu thereof be transmitted or delivered to or by their proctor or solicitor at the address furnished by him, and all acts to be done by the parties may be done by their proctors or solicitors. A form of appearance is given in the Appendix, No. 38.

Change of Proctor or Solicitor.

38. A party may obtain an order to change his proctor or

solicitor upon application by summons to the judge, or, in his absence, to the provincial registrar. In case the former proctor or solicitor neglects to file his bill of costs for taxation at the time required by the order served upon him the party may, with the sanction of the judge or provincial registrar, proceed by the new proctor or solicitor without previous payment of such costs.

TIME FIXED BY THESE RULES.

39. The judge shall in every case in which a time is fixed by these rules and orders for the performance of any act have power to extend the same, with such qualifications and restrictions, and on such terms, as to him may seem fit.

40. To prevent the time limited for the performance of any act, or for any proceeding in default, from expiring before application can be made to the judge for an extension thereof, the provincial registrar may upon reasonable cause being shown extend the time.

41. The time fixed by these rules and orders for the performance of any act shall in all cases be exclusive of Sundays, Christmas Day, and Good Friday.

AFFIDAVITS.

42. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent is to be inserted therein. Affidavits may be sworn before the judge, or any provincial or diocesan registrar, or a commissioner to administer oaths in Chancery.

43. In every affidavit made by two or more persons the names of the several persons making it are to be written in the jurat.

44. No affidavit will be admitted in which any material part is written on an erasure, or in the jurat of which there is any interlineation or erasure, or in which there is any interlineation the extent of which at the time when the affidavit was sworn is not clearly shown by the initials of the authority before whom it was sworn.

45. Where an affidavit is made by any person who is blind, or who from his or her signature, or otherwise, appears to be illiterate, the authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also made his or her mark, or wrote his or her signature thereto, in the presence of the authority.

46. No affidavit is deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his proctor or solicitor, or before a partner or clerk of his proctor or solicitor.

47. Proctors and solicitors, and their clerks respectively, if acting for any other proctor or solicitor, shall be subject to the rules and orders in respect of taking affidavits which are applicable to those in whose stead they are acting.

48. Where a special time is fixed for filing affidavits no affidavit filed after that time shall be used unless by leave of the judge.

49. The above rules and orders in respect to affidavits shall, so far as the same are applicable, be observed in respect to affirmations and declarations.

Taxing Bills of Costs.

50. All bills of costs are referred to the registrar of the respective registry for taxation, and may be taxed by him without any special order for that purpose. Such bills are to be filed in the registry.

51. Notice of the time appointed for taxation will be forwarded to the party filing the bill at the address furnished by such party.

52. The party who has obtained an appointment to tax a bill of costs shall give the other party to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at or before the same time deliver to him or them a copy of the bill to be taxed.

53. When an appointment has been made by the registrar for taxing any bill of costs, and any parties to be heard on the taxation do not attend at the time appointed, the registrar may nevertheless proceed to tax the bill after the expiration of a quarter of an hour, upon being satisfied by affidavit that the party not in attendance had due notice of the time appointed.

54. The bill of costs of any proctor or solicitor will be taxed on his application as against his client after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons after sufficient notice given to the practitioner.

55. The fees payable on the taxation of any bill of costs shall be paid by the party on whose application the bill is taxed, and

shall be allowed as part of such bill; but if more than one-sixth of the amount of any bill of costs taxed as between practitioner and client is disallowed on the taxation thereof no costs incurred in such taxation shall be allowed as part of such bill.

56. If an order for payment of costs is required the same may be obtained by summons on the amount of such costs being certified by the registrar. A form of monition for costs is given in the Appendix, No. 39.

SUMMONSES.

57. Where the decision of the judge is required a summons may be taken out by either party in reference to any incidental matter arising out of or connected with any proceedings under the Act. A form is given in the Appendix, No. 40.

58. A true copy of the summons is to be served on the party summoned three clear days at least before the summons is returnable, and before five o'clock p.m. On Saturdays the copy of the summons is to be served before two o'clock p.m.

59. On the day and at the hour named in the summons the party taking out the same is to present himself, with the original summons, before the judge, at the place appointed for hearing the same.

60. Both parties will be heard by the judge, who will make such order as he may think fit, and a minute of such order will be made by the provincial registrar.

61. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the judge, who will thereupon make such order as he may think fit.

62. An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the judge on that occasion.

63. If a formal order is desired the same may be obtained from the provincial registrar on the application of either party, and for that purpose the original summons, or the copy, served on the party summoned must be filed in the provincial registry. An order will thereupon be drawn up and delivered to the person filing such summons or copy.

64. If a summons is brought to the provincial registry with

consent to an order endorsed thereon signed by the party summoned, or by his proctor or solicitor, an order will be drawn up without the necessity of going before the judge, provided that the order sought is in the opinion of the provincial registrar one which under the circumstances would be made by the judge.

CASES NOT PROVIDED FOR.

65. In any case not provided for by these rules the directions of the judge shall be obtained upon a summons to be taken out by the party requiring such directions.

NOTE.—In the event of the judge becoming official principal of the *Arches Court* of Canterbury, or of the *Chancery Court* of York, these rules and orders and the forms and fees prescribed shall be applicable *mutatis mutandis* to all cases thereafter arising, such necessary alterations in the style of the forms being made as the judge may direct.

INDEX.

ABSOLUTION.—*See* CONFESSION. PAGE

ACCOUNTS,
churchwardens'.—*See* CHURCHWARDENS.

ACT OF UNIFORMITY AMENDMENT ACT, 1874. 375

ACTIONS
in respect of church goods, by and against churchwardens - - - - - 49
in respect of freehold or possession of church - 71
limitation of time for, for anything done under 53 Geo. 3. c. 127. - - - - 240
cannot be commenced by churchwardens as such after their successors are admitted - - 439
may be continued by them if commenced before - 439

ADJOURNMENT OF VESTRY.—*See* VESTRY.
amendment for, for the mere purpose of evading a necessary church rate, illegal - - - 170

ADORATION
of consecrated elements, may not be taught - 413
of our Lord present in the Eucharist, under the form of bread and wine, may lawfully be taught - - - - - 414

ADULTERY,
presentment of minister for questioning females as to, in confession - - - - 417

AGNUS DEI,
the singing of - - - - - 405

ALB.—*See* VESTMENTS. PAGE

ALMS,
at offertory, collection and disposal of - 348 & (*n*)

ALTAR.—*See* COMMUNION TABLE.

ARCHDEACON.—*See* ORDINARY.

APPEAL
against decision of justices on summary proceedings for church rates - - 216, 231, 236
under the statute 20 & 21 Vict. c. 43 - 233, 239
against convictions under statute 23 & 24 Vict. c. 32 (the Act for abolishing the jurisdiction of the Ecclesiastical Courts in suits and causes of brawling) - - - - - 351
against convictions under 48 Geo. 3, c. 75 (the Act for providing for the burial of bodies cast on shore by the sea) - - - - 394
in suits for subtraction of church rates.—*See* ECCLESIASTICAL COURTS.

ASSESSMENT,
to a church rate to be made on the parishioners according to their ratable properties, and by themselves in vestry assembled - - 168

BAG
for collecting offertory money - - (*n*) 57

BALDACHINO,
illegal - - - - - - 63

BALLOT,
vote by, at vestry meetings illegal - - 115

BANNS OF MARRIAGE,
publication of - - - - 395 *et seq.*

BAPTISM,
font in church for, to be furnished by churchwardens - - - - - 57
registry book for, to be furnished by churchwardens - - - - - 69

BAPTISM—*continued.* PAGE
obligation on minister to celebrate - - 375
fees for, forbidden - - - - - 375
indictment for administering in other form than that prescribed by the Book of Common Prayer - - - - (*n*) 381
indictment for administering without the sign of the cross - - - - (*n*) 381
when and where to be administered - - 395
by layman, validity of - - - - 389
by lay heretic or schismatic, validity of - 390, 391
regeneration by - - - 379, 418, (*n*) 423
copy of registry book to be forwarded by churchwardens to bishop's registry - - (*n*) 438

BASIN
for offertory money - - - - 57

BEADLE
what - - - - - - 144
his duties - - - - - - 144
his salary - - - - - - 144
under Church Building Acts - - - 144

BELLS,
there must be one to ring to church and toll at funerals - - - - 69, 305
a ring of, not necessary - - - - 305
not to be rung superstitiously - - - 353
power of churchwardens over - - - 368

BIER.—*See* BURIAL.

BIRETTA - - - - - - - 403

BISHOP.—*See* ORDINARY. ECCLESIASTICAL COURTS.

BRAWLING
in church or churchyard - - - 350, 356
suits for, in Ecclesiastical Courts, except against persons in holy orders, abolished - - 350
substituted remedy before justices - 350, 356

BURIAL, PAGE
bier for, to be supplied by churchwardens - 68
registry book for, to be supplied by churchwardens 69
right to, in churchyard - - - - 382
mandamus to enforce.—*See* MANDAMUS. 384, 386
indictment and criminal information against minister for refusing - - - - 384
choice of place depends on minister - - 384
custom to the contrary bad - - - 384
fees for - - - - 384, (*n*) 385, 392
what consent necessary for burial in church or chancel - - - - - 385
of non-parishioners dying out of the parish - 392
in cemeteries, &c. - - - - (*n*) 392
of bodies cast on shore by the sea - - 393
of paupers - - - - (*n*) 394
copy of registry book to be transmitted by churchwardens to bishop's registry - - (*n*) 438

BURIAL SERVICE,
when not to be read.—*See* BAPTISM. MINISTER. 387, (*n*) 424

CANDLESTICKS, &c.,
on communion table - - - - - 58

CANONS,
to what extent, and on whom binding - 19, 417
9. Censuring authors of schism - - - 367
18. Enforcing reverence at church, and bowing at the name of Jesus - - - 345, 417
19. Concerning loiterers near the church - - 346
24. Concerning the use of the cope - - 402
26. As to the non-admission of notorious offenders to the communion - - - - 412
27. As to the non-admission of schismatics to the communion - - - - - 412
30. Assuming the regeneration of infants in baptism - - - - (*n*) 424
54. Concerning the use of the surplice - - 401
85. Regulating the repair of churches - - 74

CANONS—*continued.* PAGE
88. Against profanation of churches - - 353
89 & 90. Regulating the election of churchwardens 18
111. Concerning disturbers of divine service - 346
119. Concerning articles of inquiry - 45, 371

CATHEDRAL,
seats in - - - - - - 328
when cope to be used in - - - - 402

CATTLE,
keeping of, in churchyard, &c. - - - 353

CHANCEL,
parishioners may be bound to repair by custom - 74
parson bound to repair by the general law 73, 359
whether appropriator, impropriator, or instituted rector - - - - - - 359
sometimes vicar by special composition - - 359
trees in churchyard, &c., may be cut down for necessary repairs of - - - - 359
what consents necessary for burial in - - 385
seats in.—*See* SEATS.

CHANCERY.—*See* INJUNCTION.

CHASUBLE.—*See* VESTMENTS.

CHURCH.—*See* CHURCHWARDENS. FACULTY. PARISH. REPAIRS. SEATS.
freehold of, in rector - - - 71 & (*n*)
possession of, in incumbent - - (*n*) 71
freehold of subscription churches, &c. - (*n*) 72
reverence to be preserved in - - - 345
sanctity of, to be preserved at all times - - 352
right to keys of, - - - - - 365
burial in - - - - - - 385

CHURCH BUILDING ACTS,
churchwardens under - - - - 4
not parochial officers - - - - 4
their duties - - - - 4 & (*n*)

CHURCH BUILDING ACTS—*continued.* PAGE
qualifications for - - - - 16 *et seq.*
election of - - - - 27 *et seq.*
repair of churches under - - - 80 *et seq.*
powers under, for borrowing money on security of church rates for the enlarging or otherwise extending accommodation - - - 204
——— for the building of new churches - - 206
——— for the purpose of repairs - - - 208
by whom rates under to be made - - 255
invalidity of rate under, where requisites of Act have not been complied with - 210, 250
provisions under for letting of seats (*n*) 333, 337 *et seq.*

CHURCH PORCH,
loiterers in not to be suffered during divine service 346
not to be converted into a stable for horses - 354

CHURCH RATES,
Compulsory Church Rate Abolition Act, 1868 - 87
estimate for, to be submitted to vestry - 96, 166, 277
instances of estimates for - - - 263 *et seq.*
to be made by the churchwardens and parishioners in vestry assembled - - - 97, 306
could not have been made by select vestries under Church Building Acts - - - 138
parishioners not bound by churchwardens' estimates for - - - - - 167
the question considered, whether two rates should be made, one for the repairs of the fabric of the church, the other for the ornaments and incidental expenses - - - - 169
the practice of making one church rate for all purposes now well established - - 170
principle of assessment - - - - 173
present general course to make rate according to value of the lands - - - - 173
including houses, &c. - - - - 173
custom for houses, &c., to be exempt, bad - 173

CHURCH RATES—*continued.* PAGE
to be laid on every occupier of land in the parish, though he live elsewhere - - - 174
but not in respect of land in another parish - 174
where lands farmed out, tenant to be rated - 174
stock-in-trade liable to be rated, where it has usually been so - - - - 174
ratability of shipping as stock-in-trade - - 287
rules as to rating, for guidance of churchwardens and vestry - - - - - 174
to be made according to value of lands, &c., by an equal pound rate - - - - 175
customary contribution by vills - - - 175
all houses and lands, and property of that description, *primâ facie* liable - - - 175
rectory or vicarage not liable - - - 176
liability of rector and vicar in respect of lands not part of rectory or vicarage - - - 177
glebes out of parish chargeable to - - 177
prebendal lands liable to repair chancel exempt from - - - - - - 177
repairing chapel of ease no exemption - - 178
whether custom to repair parochial chapel may exempt from - - - - - 178
supporting private chapel, though attached to public institution, no exemption - - - 179
exemption of lands in possession of Crown - 179
exemption of land used for public purposes - 180
as to ratability of charitable institutions - - 181
hall of company ratable to - - - 183
stall in market not ratable to - - - 183
pew owner not ratable to - - - 183
mere easement not ratable to - - - 183
exclusive occupation of way or towing path ratable - - - - - - - 183
churches, chapels, and duly certified meeting houses exempt from - - - - 185
literary and scientific institutions, &c., when exempt from - - - - - 186

CHURCH RATES—*continued.* PAGE
Sunday and ragged schools, exemption of - 188
principle on which assessment to be made - 190
form of church rate - - - - 193
faculty to conform - - - - 195
not essential to validity of - - - 195
summary proceedings before justices of the peace for enforcing payment of, not exceeding 10*l.* 214
distress for nonpayment of - - 215, 228
appeal to quarter sessions - - - 216, 231
appeal to superior courts under 20 & 21 Vict. c. 43 233
summary proceedings against Quakers - - 235
appeal to quarter sessions - - - 236, 239
appeal to superior courts under 20 & 21 Vict. c. 43 - - - - - - - 239
suits for, in the Ecclesiastical Court (*see* ECCLESIASTICAL COURTS) - - - - 242
delay in prosecuting, censurable - - - 244
grounds for resisting payment of - - - 248
that it was illegally made - - - - 248
instances - - - - 248 *et seq.*
that it was made for an illegal purpose - 248, 358
e. g., for repair of chancel as well as church, except where parishioners bound to repair chancel, invalid - - - - - 259
for rebuilding, &c., without faculty, invalid - 259
for stipend of minister, invalid - - - 260
items not invalidating - - - 260 *et seq.*
retrospective invalid - - - - 268
though for money borrowed under Church Building Acts - - - - - 268
though not retrospective on the face of it - - 270
for expenses of current year not illegal - - 272
for payment of debt as soon as due, not illegal - 272
for costs of suit terminated during the year, but commenced before, not illegal - - 273
and *quære*, whether retrospective rate necessarily illegal - - - - - 274
that the rate is unnecessary - - 248, 275

CHURCH RATES—*continued.* PAGE

e. g., if funds in hand applicable to church rate, bad - - - - - - 275
if outstanding rate uncollected, bad - - 275
but not if churchwardens have done all they can to collect it - - - - - 275
not if outstanding fund one over which the Ecclesiastical Court has no control - - 275
nor if power of enforcing payment be matter of doubt or difficulty - - - 276
excessive rate illegal - - - - 276
must be shown excessive - - - - 280
that defendant has been unfairly assessed 248, 280
omission of persons liable - - - 281, 282
what omissions in rate not fatal - - - 282
as to omission of those too poor to pay - - 283
safer to assess and then excuse the poor - - 285
assessment of wrong person, *e. g.*, landlord instead of occupier - - - - 286 & (*n*)
inequality of assessment - - - 281, 287
resistance of, for inequality, not favoured - 287
slight inequalities not fatal to - - - 288
that defendant is assessed for property for which he is not liable - - - 248, 290
that he is not occupier - - - - 290
that the land exempt - - - - 291
that the land out of the parish - - - 291
cannot be amended - - - - 294
not manifestly inadequate or collusive, should be accepted by churchwardens - - - 298
quantum of, spiritual court has no power to decide on - - - - - - 298
made by churchwardens alone, bad - - 306
made in vestry by them, or by them and minority of vestry, against concurrence of majority, bad - - - - - - 308
temporal courts cannot enforce the making of - 309
proceedings in the spiritual court to enforce the making of - - - - 310 *et seq.*

CHURCH RATES—*continued.* PAGE
mandamus to enforce making of. *See* MANDAMUS.
attempt to excite resistance to payment of, or to render odious those who collect them, illegal - - - - - 322
conspiracy for such purpose indictable - - 322
annual returns of to be made to Secretary of State 438

CHURCHWARDENS,
office of, and their duties - - - - 1
ex officio overseers of the poor - - - 3
but not churchwardens of township or chapelry - 3
nor churchwardens under Church Building Acts - 4
under Church Building Acts.—*See* CHURCH BUILDING ACTS - - - - 4
who liable to be chosen - - - - 5
who disqualified from serving the office of - 9
who exempt from serving the office of - 10 *et seq.*
of township, &c., must be inhabitants of township 15
qualifications for, under Church Building Acts 16 *et seq.*
how to be chosen - - - 18, 22 *et seq.*
how long to remain in office - - 18, 45
number of - - - - - - 21
by custom there may be but one - - - 21
a custom that there shall be no churchwarden, bad - - - - - - 21
by custom there may be several, each chosen for a separate district - - - - 22
modes of election by custom - - 22 *et seq.*
where custom cannot be observed, canon to be followed - - - - - - 25
ordinary cannot compel election of - - 33
election to be enforced by *mandamus* - - 33
when chosen, sometimes excused, on payment of fine - - - - - - 34
form of oath formerly required from - - 36
declaration now substituted in place thereof - 37
admission of, necessary to complete legal title - 37
refusing, when elected, to enter upon the office, may be compelled by the Ecclesiastical Court 38

CHURCHWARDENS—*continued.* PAGE
person re-elected should be re-admitted - - 39
person re-elected for second year not compellable to serve - - - - - 39
except where custom that he should - - 40
methods of claiming exemption - - - 40
ordinary bound to admit - - - 40 *et seq.*
articles of inquiry to be furnished to 45, 371, & (*n*)
on removal from parish place to be supplied - 46
removal of, for misbehaviour - - - 46
as soon as admitted are in the full power of their office - - - - - - 48
jurisdiction of, extends over whole parish - - 48
are the guardians or keepers of the church, and the legal representatives of the parish body 1, 49
for benefit of the parish a kind of corporation, and to what extent - - 49, 70, & (*n*), 71
goods of church vested in, for use of parishioners 49, 361, 364
but not goods placed in church by private persons unless dedicated to parish - - - 361
may purchase church goods for use of parishioners 49
may sue and be sued in respect thereof - - 49
not a corporation in respect of land, except in London by special custom - - - 70
to repair nave of church and churchyard by means of a rate - - - - - 72
but not chancel, except by custom - - 73
duties of with reference to the repairs of churches, regulated by the 85th canon - - - 74
this canon declaratory of the common law - 75
personal liability of, on their contracts - 86, 439
have no lien on parish books - - - 86
as soon as admitted to office should survey church and churchyard - - - - 96
to call a vestry to make rate - - - 96
repairs to be effected by—1st, the repairs of the church ; 2nd, the repairs of the churchyard - 75
what they are - - - - 76 *et seq.*

CHURCHWARDENS—*continued.* PAGE

to repair additions *legally* made to the church utensils, churchyard, &c. (*see* CHURCH RATES. REPAIRS). - - - - 203, 305

proceedings by, for recovery of church rates (*see* CHURCH RATES. ECCLESIASTICAL COURTS. JUSTICE OF THE PEACE.) - - 214, 242

to act jointly - - - 246, & (*n*) 363

should accept rate granted by vestry, if not manifestly inadequate, and, when exhausted, convene vestry for another rate - - - 298

duties of, upon vestry refusing a rate 299, 305 *et seq.*

to ascertain whether repairs necessary - - 304

if not necessary cannot enforce repairs - - 305

proceedings by, to compel the repairs - 310 *et seq.*

proceedings against, if they neglect their duty in respect of church rates - - - 317

their duties with respect to seats (*see* SEATS) - 323

should regularly attend church - - 6, 344

presentments by (*see* PRESENTMENTS).

to preserve reverence and attention at church, &c., 345 *et seq.*

not to suffer loiterers in the church and churchyard during divine service - - - 346

have nothing to do with divine service, except to collect the alms at the offertory - - 348

to refuse admission of strange preachers into pulpit, unless they produce letters of orders - 348

bound to repress all indecent interruptions in divine service even by minister - 346, 349

their power for this purpose - - - 346

bound to protect the sanctity of the church and churchyard at all times - - - 352

but *quære*, as to extent of their power, when no service going on - - (*n*) 347, (*n*) 353

not to allow quarrelling or brawling in church or churchyard - - - - - 356

their power over church goods (*see* GOODS OF CHURCH) - - - - 362 *et seq.*

CHURCHWARDENS—*continued.* PAGE
their power over monuments, &c. - - 364
their power over church bells - - - 368
their liabilities in respect of church goods (*see* GOODS OF CHURCH) - - - 362, 443
to make their presentments (*see* PRESENTMENTS) - 371
are bound to do so - - - - 372
may be punished by ordinary, if they refuse - 372
to use all due temporal means to suppress impiety, immorality and disorder - - - 428
their power, &c., under "The Public Worship Regulation Act, 1874," - 430, 431, 433
to act as sequestrators (*see* SEQUESTRATOR) - 434
to present incoming churchwardens - 36, 438
formerly required at Easter visitation to hand in bills indented of christenings, marriages and burials - - - - (*n*) 438
now to transmit copies of registry books of baptism and burials to registry of bishop, by post (*n*) 438
can do no act as such, when successors admitted - 439
may continue action previously commenced by them - - - - - - 439
method of passing their accounts - - - 439
exceptions to their accounts - - - 441
to deliver up church goods to successors - - 443
their liabilities for non-accounting, fraud, &c. 441 *et seq.*
jurisdiction of spiritual court as to their accounts 442, 445
as to their conduct in respect of church goods 362, 444
to make annual returns of church rates to Secretary of State - - - - - 438
as to auditing their accounts in respect of rates for money lent on security of church rates - 88

CHURCHWAYS,
preservation and reparation of - - - 78

CHURCHYARD,
parish, duty of to repair - - - 73, 75, 302

CHURCHYARD—*continued.* PAGE
what repairs of to be done - - - 76
what consents requisite for additions in - - 196
alterations in, under 59 Geo. 3, c. 134, s. 9 - 197
loiterers in, during divine service, not to be suffered - - - - - - 346
sanctity of, to be protected at all times - - 352
trees in, not to be cut down, except for necessary repairs of chancel, &c. - - - 359
rights of burial in (*see* BURIAL) - - - 382
additional, statutes as to - - - (*n*) 254
CLERGYMEN
may lawfully hold that an infant is not regenerated *without God's grace and favour* - - 421
but not that regeneration is not given in baptism, but by an act of prevenient grace 419, 422, 423, & (*n*)
officiating at religious services of Nonconformists to be presented - - - - 425
officiating in unconsecrated chapel without license according to the rites of the Church of England to be presented - - - 425
although he and his chapel be duly registered as a dissenting teacher and chapel - - 426
See CURATE. MINISTER. RECTOR. VICAR.
CLERK, PARISH,
what - - - - - - 144
how chosen - - - - - 145
qualifications for - - - - - 145
appointment of, need not be in writing - - 146
license of - - - - - - 146
may appoint deputy - - - - 146
nature of office - - - - - 146
how removable - - - - 146, 151
his duties - - - - - 146, 148
his salary, &c. - - - - - 148
whether a woman can be - - - 148 & (*n*)
under Church Building and New Parishes Acts 148, 149

CLERK, PARISH—*continued.* PAGE
in holy orders under 7 & 8 Vict. c. 59 - - 149

COMMUNION TABLE,
requisites of - - - - - 50
coverings of - - - - 51 *et seq.*

CONFESSION,
presentment of minister for systematic admission to - - - - - - 417
sanctioned and recommended by our Church (*n*) 418

COPE.—*See* VESTMENTS.

CREDENCE TABLE,
legal and proper - - - - 55 *et seq.*

CRIMINAL INFORMATION.—*See* BURIAL.

CROSS,
legality of, as a decoration in churches - 59 *et seq.*

CURATE.—*See* PERPETUAL CURATE.
nomination of churchwarden by - - - 19
appointment of parish clerk by - - - 145

CUSTOM.—*See* CHURCHWARDENS. VESTRIES, SELECT.
what - - - - - - 20
to be tried by the common law courts - - 20
as to number and election of churchwardens 20 *et seq.*
for parish to repair chancel, good - - - 74
for church rate not to be laid on houses, or pasture land, &c., bad - - - - 173
for township to contribute to parish church rate in a given proportion, good - - 175, 318
to contribute to such rate without being summoned to vestry, illegal - - - 175, 319
to perambulate parochial boundaries - - 292
to enter house not on boundary line during perambulation of parish, bad - - - 292
to claim refreshments during perambulation of boundaries, bad - - - - - 292

CUSTOM—*continued.* PAGE
to dispose of seats independently of ordinary, illegal - - - - 327 & (*n*)
for churchwardens to erect monuments without consent either of ordinary or minister, bad - 365
to pay fee for burial, lawful - - - 382
but not when body is not buried in the parish 383 & (*n*)
for parishioners to be buried in a vault, or to select place of burial in churchyard, bad - - 384

DEAD—*See* BURIAL.
prayer for, not forbidden by the church - - 366
not to be offered publicly by minister during divine service - - - - 406

DISSENTING TEACHER,
exemption of, from serving office of churchwarden 13
baptism by, not a nullity - - - 389 *et seq.*
See METHODIST PREACHER.

DISSENTER
may serve the office of churchwarden by deputy - 13
when not compellable to serve at all - - 14

DIVINE SERVICE,
reverence to be preserved during - - - 345
loiterers not to be suffered near church in time of 346
disturbers of, to be presented - - - 346
decorum to be preserved during - - - 346
churchwardens cannot interfere in - - 348
penalties for disturbing - - - - 349
no action at law for refusing to celebrate (*n*) 374
minister not to diminish, add to, or alter 377 *et seq.*
See CANONS. CHURCHWARDENS. MINISTER. PRESENTMENTS.

DONATIVE CHURCHES,
churchwardens of - - - - 45

ECCLESIASTICAL COURTS,
jurisdiction of, how affected by "The Compulsory Church Rate Abolition Act, 1868," 87, 88, 92, 93, 94, 95, 212, 301

ECCLESIASTICAL COURTS—*continued.* PAGE
jurisdiction of, how affected by 53 Geo. 3, c. 127, 214 *et seq.*, 234
proceedings for subtraction of church rate must be brought in, except where summary jurisdiction given to justices of the peace - - 242
to be brought in court of ordinary - - 242
appeal to the archbishop's court - - - 242
an ultimate appeal to the Queen in Council - 242
case may be heard in archiepiscopal court by letters of request in first instance - - - 242
prohibition to restrain - - - - 243
unnecessary delay censured - - - 244
but delay no legal objection to right to recover - 245
suit must be prosecuted in lifetime of person assessed - - - - - 245
semble, cannot be sustained against a bankrupt or insolvent - - - - - 245
consequences of party not appearing to citation - 246
grounds for disputing payment of rate in (*see* CHURCH RATE.)
costs of suit in - - - - - 294
enforcement of decree in - - - 295 *et seq.*
proceedings in, to enforce repairs - 310 *et seq.*
jurisdiction of, in cases of church seats 323 *et seq.* 333 *et seq.*
——— in cases of brawling 350, 356, 357 *et seq.*
——— over churchwardens' accounts, 422 *et seq.*
——— in respect of church goods - 363, 444

ESTIMATE,
of expenses of repairs, &c. - 96, 166, 277
instances and forms of - - - 263 *et seq.*

FACULTY,
to confirm church rate - - - - 195
required when anything new is to be added to the church or churchyard - 196, 197, 333, 365
when not necessary - - 197, 333, 365
for seat in church appurtenant to a house in parish - - - - 324, 333

FACULTY—*continued.* PAGE
for seat in *private* aisle, as appurtenant to a house not in the parish - - - - 334
But *quære*, where seat in *public* aisle or *body* of church? - - - - 324 & (*n*)
for appropriating any portion of churchyard to purely secular purposes will not be granted - 354
to build vestry-room on churchyard has been granted - - - - - 354
So, for infant church school under "The Elementary Education Act, 1870" - - - 355
frequently dispensed with in erection of monuments, &c., by reason of the confidence reposed in the minister - - - 365
costs on and incidental to the grant of - 429 & (*n*)

FALLED STOOL - - - - - 57

FINING,
practice of, for not serving the office of churchwarden - - - - - 34

FLOWERS,
on communion table - - 59, 63, 403, 404

GOODS OF THE CHURCH,
vested in churchwardens for the use of the parish 49, 361
churchwardens may purchase - - - 49
may sue and be sued for as a corporation - 49
bound to provide and keep in order - - 49
what bound to provide and keep in order 50 *et seq.* 303
power of churchwardens to dispose of - - 362
to be delivered over to incoming churchwardens 443

GOODS OF PRIVATE PERSONS
do not vest in churchwardens by the mere act of placing them in the church - - - 361

GOWN (Black),
not to be used by minister - - 401 & (*n*)

PAGE

INDICTMENT.—*See* BAPTISM. CHURCH RATES. MARRIAGE. MINISTER.

INHABITANT,
meaning of the word - - - - 6
in what sense churchwardens must be inhabitants - - - - - 6

INFORMATION. CRIMINAL.—*See* BURIAL.

INJUNCTION
to restrain minister from pulling down wall in churchyard, or from committing any other permanent nuisance there - - - 354

JUSTICE OF THE PEACE,
summary proceeding before, for recovery of church rates not exceeding 10*l.* - - 214
against Quakers, for sums not exceeding 50*l.* - 235
for disturbing minister in execution of his ecclesiastical duties, indecent behaviour in church, &c. - - - 350, 351 & (*n*), (*n*) 388
for profanation of Lord's Day - - 373 & (*n*)
for penalties under the Act (48 Geo. 3, c. 75) for providing for the decent burial of dead bodies cast on shore from the sea - - - 393

LESSONS ("The Prayer Book (Tables of Lessons) Act, 1871)" - - - - - 375

LETTERS OF REQUEST - - - - 243

LIMITATION
of actions, for anything done under 53 Geo. 3, c. 127 - - - - - 240
of time for proceeding under "The Public Worship Regulation Act, 1874" - - 430, 431

LONDON,
parishioners in, by custom, choose both churchwardens in old parishes - - - 23, 70
——— ——— by custom, repair chancel in - 74

LONDON—*continued.* PAGE
vestries of, governed by the Metropolis Local Management Acts - - - - 156
churchwardens have disposal of seats in chancel in 332

LORD'S DAY,
penalties for profaning - - - - 373

LORD'S SUPPER,
churchwardens to provide requisites for - - 56
as to action at law for refusing to administer (*n*) 374
how often to be administered - - 375 & (*n*)

MANDAMUS
to elect churchwardens - - - - 33
to admit churchwardens - - - 40
to call a vestry to deliberate on the propriety of making a church rate - - 309, 318
not granted to make a church rate - 310, 318
to compel wardens of a chapelry to levy customary proportion of rate already assessed - - 318
to make a rate by statute - - - 320
to whom to be directed - - - - 322
caution as to motion for - - - - 322
to compel minister to permit burial of person dying in the parish - - 384, 386
not granted to enforce burial in a vault, or in a particular part of the churchyard - - 384
semble, confined to enforcing the common law right of interment in the churchyard - 386
sed quære, if it will not go to enforce Christian burial - - - - (*n*) 386
will not be granted when mode of burial in question - - - - - 386

MARRIAGE,
action against minister for refusing to celebrate (*n*) 374
indictment against, for refusing to celebrate (*n*) 381
indictment against, for marrying with rites of the Church after civil marriage in dissenting chapel or registrar's office - - 397 *et seq.*

MARRIAGE—*continued.* PAGE
to be presented if he solemnize contrary to law - 395
time of publication of banns - - - 395

MARRIAGE REGISTRY,
books supplied to incumbent or minister on application in writing to the Registrar-General, Somerset House, London - - (*n*) 69
copy of, to be transmitted by incumbent to superintendent registrar four times a year (*n*) 438

METHODIST PREACHER,
as to his right to the titles of "minister" and "reverend" on tombstone - - - 366
(and prefatory introductions) - - - vi

MEETING HOUSE,
Notice of vestry meeting need not be affixed to - 101

METROPOLIS LOCAL MANAGEMENT ACTS, 156 *et seq.*

MINISTER.—*See* BAPTISM. BURIAL. CLERGYMAN. MARRIAGE. PRESENTMENT.
vestments of - - 64 *et seq.*, 401 *et seq.*
his right to preside at vestry meetings - - 109
penalties for interrupting, molesting, &c., whilst in execution of his duties 349 *et seq.*, (*n*) 388
to be presented if he violate churchyard 355, 354
for non-repair of chancel, &c. - - - 359
if he be guilty of breach of duty (*see* PRESENTMENT).
whether action lies against, for refusing to celebrate divine service - - - (*n*) 374
whether for refusing to marry - - (*n*) 374
whether for refusing to administer the Lord's Supper - - - - (*n*) 374
no indictment against for using prayer before sermon - - - - (*n*) 381
indictable for using other prayers instead of the common prayer - - - (*n*) 381

MINISTER—*continued.* PAGE
indictment against, for administering baptism in other form than that prescribed by the common prayer - - - - (*n*) 381
indictments against, for baptizing without the sign of the cross, &c. - - - (*n*) 381
whether indictable for refusing to marry - (*n*) 381
not indictable for marrying after previous legal marriage in dissenting chapel, or before registrar - - - - - 397 *et seq.*
bound to permit person dying in parish to be buried in churchyard - - 384, 386
may be compelled by *mandamus* - - 384
may be punished by criminal information or indictment if he refuse - - - 384
cannot be compelled to bury in vault, or in particular place in churchyard - - - 384
his consent for burial in church - - - 385
bound to serve the church duly - - - 374
—— to say the prayers - - - 374, (*n*) 376
—— to preach sermons - - - - 374
—— to catechise the youth . - - 374
—— to visit the sick - - - - 374
—— to administer the sacraments - - 374
—— to church women - - - - 399
—— to read the burial service over all parishioners, except those that die unbaptized or excommunicated, or have laid violent hands upon themselves (*see* BURIAL. BAPTISM) 374, 387
but not to that part of the service which is directed to be read in the church - - - 392
his liability for refusing - - - - 387
when and where to baptize - - 395 & (*n*)
to be presented if he solemnize marriage contrary to law - - - - - 395
———— if he refuse to use the Book of Common Prayer - - - - 399
———— if he wilfully and obstinately use any other rite, &c. - - - 399

MINISTER—*continued.* PAGE
to be presented if he use unlawful ritual, ornaments, or dresses - - - - 401 *et seq.*
———— if he deprave the said book - - 410
———— if he maintain doctrine directly contrary to the articles of religion, &c. - 410 *et seq.*
———— if he officiate at the religious services of Nonconformists - - - - 425
———— if he perform offices of the church in unconsecrated building without license of the bishop - - - - - 425
for non-residence - - - - - 426
for farming, trading, &c. - - - - 426
for other breaches of ecclesiastical discipline - 427
for gross impiety or immorality - - - 427
to transmit copy of marriage registries to superindent registrar four times a year - (*n*) 438

ORDINARY,
office of, in admitting churchwardens, ministerial only - - - - - - - 40
cannot therefore refuse to admit churchwardens when duly elected - - - - 40
but is bound to take care that an election void in itself shall have no legal effect - - 41
may therefore inquire whether party has been duly elected - - - - - - - 42
license of, necessary for additions to church or churchyard - - - 196, 333, 365
jurisdiction of, over church seats 323, 324, 325 *et seq.* 331, 333 *et seq.*
———— in respect of churchwardens' accounts 442 *et seq.*
———— in respect of churchwardens' conduct with regard to church goods - - 362, 444

ORGAN,
not necessary, except in cathedral church - - 304

ORGANIST,
parishioners not bound to provide 304, 305 & (*n*)

ORNAMENTS, PAGE
meaning of word, in introductory rubric to the Book of Common Prayer - - 57 *et seq.*

PARISH
bound to repair body of church and churchyard, and to provide necessaries for divine service 72, 299
not bound to repair chancel, except by custom - 72
consent of, when and why necessary for additions &c., to church or churchyard - 197, 199
what consent of necessary for borrowing money under the Church Building Acts - 204 *et seq.*
liability of extends only to necessary repairs - 302
bound to effect necessary repairs - - 304, 306
how compellable to repair (*see* CHURCH RATES. CHURCHWARDENS).
boundaries of, to be tried by the common law courts - - - - - 291
perambulations of - - - - 292
their power of preventing burial of non-parishioners in churchyard - - - - 393

PARISH CLERK.—*See* CLERK.

PARISH, REPUTED,
what - - - - - (*n*) 3

PARSON,
freehold of church and churchyard, in 71 & (*n*) 330
bound to repair chancel, if no custom to the contrary - - - 72, 330, 359
his right to seat in chancel - - 330, 333

PERPETUAL CURATE,
possession of church, &c., in - - (*n*) 71
but only for spiritual purposes - - (*n*) 71
no prescriptive right to seat in chancel - - 330
ordinary will allot proper pew to - - - 330

PERTURBATION OF SEAT, PAGE
suit for - - - - - - 335

PEWS.—*See* SEATS.

POLL.—*See* VESTRY.

POOR RATE.—*See* CHURCH RATE.

PRAYER.—*See* MINISTER.
for the dead, not illegal - - - - 366
for the dead, by minister publicly during divine service, illegal - - - - 406
before and after sermon - 376, 380, 381 & (*n*)

PRESCRIPTIONS.—*See* BURIAL. SEAT.

PRESENTMENTS,
what - - - - - 45, 371
churchwardens to make - - 45, 371, 374, 433
of those that come not to church - - 6, 344, 373
except dissenters usually attending some place of worship, other than the Established Church 373
of persons misbehaving themselves at church - 346
of irregularities in divine service, &c. - 349, 374
of profanation of church or churchyard - - 353
of non-repair of chancel or minister's house - 358
of profanation of the Lord's Day - - - 373
of breaches of duty in minister - - - 374
examples (*see* BAPTISM. BURIAL. CONFESSION. DIVINE SERVICE. MARRIAGE. MINISTER) 374, *et seq.*
of minister officiating at religious services of Non-conformists - - - - - 425
of minister officiating in unconsecrated chapel without license - - - - 425
of offences within "The Public Worship Regulation Act, 1874" - - - - 433
of gross impiety and immorality, as well in minister as in other parishioners - - - 427

PRESENTMENTS—*continued.* PAGE
generally of all transgressions of the ecclesiastical laws - - - - - - 428

PRIVY COUNCIL.—*See* QUEEN IN COUNCIL.
Judicial Committee of, the judgment in the Gorham case - - - - 420 (*n*), 423

PROHIBITION
for disobeying writ of privilege - - - 39
to restrain suit for church rate - - - 243
to spiritual court for proceeding to try right to plea by prescription - - - - (*n*) 326

"PUBLIC WORSHIP REGULATION ACT, 1874" 429 *et seq.*

QUAKERS,
not compellable to serve as churchwardens - 14
proceedings against for the recovery of church rates - - - - - - 235
as to abolition of remedy against the persons of, in suits for subtraction of church rates, &c. 298 & (*n*)

QUARTER SESSIONS.—*See* APPEAL.

QUEEN IN COUNCIL,
appeal to, in suit for subtraction of church rates 242
——— in suits under "The Public Worship Regulation Act, 1874" - - - 432

QUESTMEN,
what - - - - - - - 2

QUO WARRANTO,
lies not against churchwardens - - - 44

RATE.—*See* CHURCH RATES.

REAL PRESENCE,
the doctrine of our Church as to - 413, 414 & (*n*)

RECTOR,
freehold of church in - - - 71 & (*n*)
may prescribe for seat in chancel - - 329, 333

RECTOR—*continued.* PAGE
but not rector of *new* parish - - - 330
ordinary will allot proper pew to rector of new parish - - - - - 330
his right to chief seat in chancel - - 330, 333
bound to repair chancel, &c. - - 73, 359
as to his authority over seats in - - - 331
as to the necessity for his consent for burial in chancel - - - - - 385
and in body of church - - - - 385

REREDOS,
with sculptural figures, legality of - - 61

ROMAN CATHOLIC,
liability of, to serve the office of churchwarden - 9
may serve by deputy, to be approved by the parishioners - - - - 10, 14
clergyman, exemption of, from serving the office of churchwarden - - - -

ROOD SCREEN,
legality of - - - - - - 58

SACRAMENT.—*See* BAPTISM. LORD'S SUPPER.

SEATS,
churchwardens have the care and management of - - - - 323, 325, 333
prescription to, in respect of house in parish—
1. In aisle - - - 323, 324, 333
2. In body of church 325, 326, 333, 334 & (*n*)
prescription to particular place in seat - - 325
prescriptive right to, must be annexed to the house - - - - - 324, 333
prescriptive right to, divisible if house divided into two or more - - - - 326
all others in body of church at disposal of churchwardens as the officers of the ordinary 325, 333
subject to appeal to ordinary - - 325, 334
must not be built too high - - - 328
taken down belong to parish - - - 328

SEATS—*continued.* PAGE
unless illegally set up, then to minister - - 229
rector's right to seat in chancel - - 329, 333
sometimes vicar prescribes to - - 330, 333
but not perpetual curate - - - - 330
nor rector of new parish - - - - 330
ordinary will assign proper seats to curate and new rector - - - - - 330
in chancel generally, law doubtful - - 330
the better opinion that churchwardens have the disposal of, under ordinary - - 331, 333
Dr. Prideaux's opinion hereon - - - 331
sale of, illegal - - - - - 332
except under Act of parliament - - - 332
cannot be let or bequeathed - - - 332
summary of the law of, by Mr. Rogers - - 333
faculties for (*see* FACULTY).
suit for perturbation of seat - - - 335
provisions as to, under Church Building Acts 337 *et seq.*
in cathedral church - - - 327, 328

SEQUESTRATION
from Chancery - - - - - 297
from Court Christian - - - - 434

SEQUESTRATOR,
what - - - - - - 434
powers, duties, and liabilities of - - 434 *et seq.*

SEVENTH COMMANDMENT.—*See* ADULTERY.

SEXTON,
what - - - - - - 153
appointment of - - - - - 153
nature and tenure of office - - - 154
duties of - - - - - 153, 154
fees and salary of - - - - - 155
woman may be, and vote for - - 5, 156
under Church Building Acts - - 149, 156

SIDESMEN, PAGE
what - - - - - - 2
who liable to serve - - - 5 *et seq.*, 18
who disqualified - - - - 8, 9, 18
who exempt - - - - 10 18,
how to be chosen - - - - - 47
duration of office - - - - - 47
formerly took an oath on admission - - 47
but now make declaration instead - 36, 47

SPIRITUAL COURT.—*See* ECCLESIASTICAL COURTS.

SURPLICE.—*See* VESTMENTS.

SWINE
not to be kept in churchyard - - - 353

TEMPORAL COURTS.—*See* MANDAMUS. PROHIBITION.
have no effectual means of compelling the making of church rate - - - - 309
have jurisdiction when seat annexed to a house 322, 335
not, if not annexed - - - 325, 326
evidence requisite in, in support of the seat being so annexed - - - - - 335

TERRIER OF GLEBE LANDS, &c.
to be provided by churchwardens - - - 69

TUNICS AND TUNICLES.—*See* VESTMENTS.

UTENSILS OF CHURCH.—*See* GOODS. CHURCHWARDENS.

VAULT,
burial in, custom for cannot be sustained - - 384

VESTMENTS,
what to be worn and what not - 63 *et seq.*, 401, 402, 403, 407, 409

VESTRY, PAGE
what - - - - - - 98
where it may be held - - 98, 131, 143
notices of - - - - - 99 *et seq.*
churchwardens attend only as parishioners, and have no right to preside - - - 109
this right by law vested in the minister - - 109
in minister's absence a chairman to be elected - 109
chairman should be ratepayer - - - 110
but if not, *semble*, proceedings good unless carried by his vote - - - - - 110
who qualified to vote at - - - - 110
plurality of votes, &c., at - - - - 113
every qualified parishioner has a right to attend - 114
may maintain action for obstruction of this right - 114
but not against chairman for rejecting his vote unless done maliciously - - (*n*) 115
bound by the acts of those who do attend - - 115
common law mode of election by show of hands, or by poll - - - - - 115
ballot at illegal - - - - - 115
voting by proxy illegal - - - - 116
right to demand poll - - - - 116
not waived by waiting till chairman has declared result of show of hands - - - 117
if poll legally demanded, chairman bound to grant it - - - - - 119
may be granted without demand, where election regulated by Sturges Bourne's Act - - 119
but not necessary in such case - - - 120
must be kept open for all qualified persons to vote 121, 124, 126
right to vote inalienably vested in qualified voter 121 *et seq.*
resolution of restraining or limiting qualification, or imposing additional qualification, illegal - 121
in case of equality, chairman, in addition to his vote according to his assessment, to have the casting vote - - - - - 127

VESTRY—*continued.* PAGE
adjournment of - - - - 127, 168
right of every ratepayer to access to place of polling - - - - - 131
but no objection that place is private property, unless access in fact denied - - - 131
minutes to be entered in vestry-book, and signed by chairman, &c. - - - - 134
those of London, Southwark, &c., governed by Metropolis Local Management Acts - - 156

VESTRY ACTS
do not extend to any parish in London or Southwark - - - - - - 156
apply only to civil parishes and places maintaining their own poor - - - - 160

VESTRY BOOK,
by whom to be provided - - - (*n*) 69
minutes of vestry proceedings to be entered in - 134
vestrymen do not incur personal liability by signing resolution in - - - - 134
unless the resolution amount to a guarantee - 134

VESTRY CLERK - - - - - 143

VESTRY, SELECT,
origin of - - - - - - 26
by custom - - - - - 135, 137
by statute - - - - 135, 136, 137
under Church Building Acts (abolished) - - 135
cannot exist otherwise - - - - 137
powers of, strictly construed - - - 137
when essential that every member should have been summoned - - - 142, 250
when that majority of members should be present at - - - - 142, 250
when that majority of those present must vote for resolution - - - - - 142

VICAR, PAGE
possession of chancel, body of church, and churchyard in - - - (*n*) 71, (*n*) 358
his further interest therein depends on endowment - - - - - (*n*) 358
sometime prescribes to seat in chancel - 330, 333
when bound to repair chancel - - - 359
may, in such case, use trees in churchyard - 360
his consent as to the necessity for burial in church 385, 386

VISIBLE PRESENCE,
of our Lord in the Eucharist, may not be taught - 413

VISITATIONS,
what - - - - - - 37(
fees at - - - - - - 42[illegible]

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262.633N
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